

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-370

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

FOOD STORE EMPLOYEES UNION, LOCAL 847,
AMALGAMATED MEAT CUTTERS AND BUTCHERS
WORKMEN OF NORTH AMERICA, AFL-CIO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 29, 1973
CERTIORARI GRANTED DECEMBER 2, 1973

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-370

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
—v.—

FOOD STORE EMPLOYEES UNION, LOCAL 347,
AMALGAMATED MEAT CUTTERS AND BUTCHER
WORKMEN OF NORTH AMERICA, AFL-CIO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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[The second opinion and judgment of the Court of Appeals and the Board's initial and supplemental decisions and orders were printed either in the petition for a writ of certiorari or in the opposition thereto, and therefore have not been reprinted.]

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

**In the Matter of: Food Store Employees Union, Local
No. 347, Amalgamated Meat Cutters
and Butcher Workmen of North
America, AFL-CIO**

Case Nos.: 6-CA-3989 and 6-RM-326

- 7.18.67 Charge filed in Case No. 6-CA-3989**
- 7.18.67 Union's objections to election in Case No. 6-RM-326, dated**
- 8.22.67 Amended charge filed in Case No. 6-CA-3989**
- 12.26.67 Complaint and notice of hearing in Case No. 6-CA-3989, dated**
- 12.28.67 Regional Director's order directing hearing on objections and notice of hearing in Case No. 6-RM-326, dated**
- 12.28.67 Regional Director's order consolidating cases, dated**
 - 1. 4.68 Heck's Inc's answer to complaint, received**
 - 2.27.68 Hearing opened**
 - 3.14.68 Hearing closed**
 - 5. 7.68 Trial Examiner's Decision, issued**
 - 5.31.68 Heck's Inc.'s exceptions to the Trial Examiner's Decision, received**
 - 6.11.68 Union's cross-exceptions to the Trial Examiner's Decision, received**
 - 6.12.68 General Counsel's cross-exceptions to the Trial Examiner's Decision, received**
 - 9.24.68 Decision and Order issued by the National Labor Relations Board**

RELEVANT DOCKET ENTRIES—Continued

- 5. 4.70 Decision of Court of Appeals, for District of Columbia, filed
- 8.11.70 Heck's motion for oral argument, received
- 8.27.70 Food Store Employees Union (hereinafter referred to as Union) response to motion for oral argument, received
- 10. 6.70 Board's Notice to parties to file statement of position, dated
- 11. 2.70 Heck's statement of position on the remand, received
- 11. 3.70 Union's statement of position on the remand, received
- 11.16.70 General Counsel's statement of position on the remand, received
- 12. 2.70 Union's response to the General Counsel's statement of position, received
- 7. 1.71 Supplemental Decision and Amended Order issued by the National Labor Relations Board, dated
- 3.21.73 Supplemental Decision of Court of Appeals for District of Columbia, filed
- 12. 3.73 Order of the Supreme Court granting certiorari, dated

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case 6-CA-3989

HECK's, INC.

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN
OF NORTH AMERICA, FOOD STORE EMPLOYEES UNION,
LOCAL NO. 347, AFL-CIO

Case 6-RM-326

HECK's, INC., EMPLOYER AND PETITIONER

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN
OF NORTH AMERICA, FOOD STORE EMPLOYEES UNION,
LOCAL NO. 347, AFL-CIO

*F. J. Surprenant, Esq., and Harold Datz, Esq., for the
General Counsel.*

*Fred F. Holroyd, Esq., of Charleston, W. Va., for Heck's,
Inc.*

*Albert Gore, Esq. (Jacobs & Gore), of Chicago, Ill., and
Mr. Ronald Skaggs, of Charleston, W. Va., for the
Charging Party—Labor Organization.*

Before Frederick U. Reel, Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

These cases, consolidated by order of the Regional Director¹ and heard at Clarksburg, West Virginia, on

¹ The charge was filed July 18, 1967, and the complaint issued December 26. The petition in the RM case was filed May 29, 1967, and

February 27, and March 5, 6, and 14, 1968,² present questions as to whether Heck's, Inc., herein called the Company, engaged in acts of interference, restraint, and coercion in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, whether its refusal to bargain with the Charging Party (herein called the Union) violated Section 8(a)(5) of the Act, and whether a Board-conducted election, which the Union lost by a vote of 19 to 16, should be set aside because of allegedly improper conduct affecting the result of the election. Upon the entire record,³ including my observation of the witnesses and after due consideration of the briefs timely filed by each of the parties, I make the following:

Findings of Fact

I. The Business of the Company, and the Labor Organization Involved

The Company, a West Virginia corporation, operates a retail store in Clarksburg as well as stores in other cities in West Virginia and Kentucky. Its annual gross sales exceed \$500,000, and it received goods and products valued in excess of \$500,000 directly from outside the State of West Virginia for use at its West Virginia stores. These facts establish, and the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

the election was held July 13. Objections were filed July 19, 1967, and the report thereon issued December 28, the same day on which the two proceedings were consolidated.

² All other dates herein refer to the year 1967 unless otherwise noted.

³ I take official notice of other proceedings before the Board involving this Respondent, including the letter from Regional Director Getreu dated March 29, 1968, in Case 9-CA-4472. The "Motion to take judicial notice" which accompanied Respondent's brief is hereby granted.

II. The Unfair Labor Practices

A. *Interference, Restraint, and Coercion*

1. The evidence in support of the allegations

The Union commenced an organizing drive among the Company's Clarksburg employees in May 1967, culminating in an election on July 13, which the Union lost, 19 to 16. During this period the Company openly and vigorously opposed the Union's efforts. The question is whether, and to what extent, the Company overstepped legal limitations during this period and its immediate aftermath.

Several employees (Robin Webb, Mary Johnson, and Beverly Davis) testified that during this period Frances Jones, head cashier and concededly a supervisor, frequently asked each of them whether they had attended union meetings and where the meetings were held. Each of them also testified that Jones had stated to her that if the Union became the bargaining representative, Company President Fred Haddad would close the store. Several other employees (Marsha Mason, Sharon Kimble, and Pamela Jeffers) testified to separate occasions on which Bill Pulice, a department head and admitted supervisor, stated that Haddad would close the store if the Union came in.

Pulice also figured in an incident of alleged unlawful surveillance of union activity. A mid-June union meeting was scheduled for shortly after 10 p.m., the store's closing time, at the Truck-O-Tel, a restaurant on the main highway leading from the store to downtown Clarksburg. Several employees, congregating outside before the meeting, saw Pulice drive past three times (i.e., first toward town, then back toward the store, and then toward town again), and noted that he was driving at a slow rate of speed and that he turned his head toward the restaurant so as to see who was there. The meeting was transferred to a nearby bowling alley on the same highway because, as employee Terry Smith testified, "so many members showed up and we had to go—and also have some privacy." Smith further testified that a day or two later

Warehouse Manager Surock, a supervisor, asked him whether he had bowled a good game the other night. Smith rejoined that Surock knew Smith had not gone to bowl but to a union meeting. Surock then asked, according to Smith, "Did you all accomplish anything?" and when Smith did not reply, Surock added: "Well, you are going to be sorry of it," and walked away.

According to the testimony of both Marsha Mason and Pamela Jeffers, Company President Haddad approached them one day in June while they were working together, and initiated a discussion with them as to why Montgomery Ward had recently closed its Clarksburg store. After the two employees expressed their opinion, Haddad told them (so they testified) that they were wrong, that the store had closed because of union activity, and that he would close this store if the Union came in. He then told the two employees that he was going to transfer them to another store because they had been "bad girls."

Employee Cynthia Marsh testified that shortly before the election one of the supervisors, Ella Morris, asked her how she was going to vote in the election, and that she replied that she did not know. Marsh also testified to a conversation with Company Vice President Ray Darnall the night before the election in which Darnall told her that the Clarksburg store was making "just enough money . . . to keep going, keep their heads above water" Marsh further attributed to Darnall in this conversation the statement that the store "might have to close down" if the Union prevailed.

During May, the same month in which the Union first demanded recognition as bargaining representative, and well after the Company, by posting a letter to all employees on its bulletin board, had made known its strong opposition to the Union, Vice President Darnall conducted a poll of the employees. He approached each employee individually, and handed the employee a slip of paper reading as follows:

I am sure that you are aware that the Food Store Employees Union are trying to organize this store. I would like to ask you if you want the Union to

represent you. You do not have to answer if you do not want to. This will have no bearing on your job.

Name _____
 Yes () No () No Comment ()

Please sign and check one. Thanks

Each employee signed and marked this "ballot" in Darnall's presence and returned it to him.*

During May, June, and July, the Company dispatched several written communications to its employees stressing the Company's opposition to the Union. The literature, which is in evidence as General Counsel's Exhibits 3 through 11, in my judgment manages to stay within the area of views, argument, and opinion permitted by Section 8(c) of the Act. Cf. *National Food Stores, Inc., t/a Big Bear Super Markets*, 169 NLRB No. 12.

After the Company rejected the Union's demand for recognition, the Company filed a petition with the Board culminating in an election on July 13. The balloting was conducted in the lounge which was separated from the store by the warehouse, so that employees leaving their work to go to vote passed through the warehouse. Before the voting commenced, a number of company officials and some union representatives were in the warehouse. The Board agent conducting the election directed them to go out of the warehouse before the polls opened, and they complied with this directive. During the balloting the warehouse door was closed. However, the employees going to and from the polls passed the waiting groups of company and union officials, and some conversations occurred between employees and one or both of the groups. The complaint alleged that the Company violated the Act by "positioning [supervisors] in the store in such a way as to insure that employees on their way to the polling place would have to walk past them." At the conclusion of General Counsel's and Charging Party's case, I granted the Company's motion to dismiss this allegation for failure to establish a *prima facie* case.

* The tally showed 11 yes, 13 no, and 6 no comment. Three employees were not polled.

The Union lost the election, held July 13, by a vote of 19 to 16 with 1 ballot challenged.⁵ After the filing of the unfair labor practice charge and the objections to the election, Company Counsel Holroyd, in the presence of Vice President Darnall, interviewed a number of employees, individually, in the store manager's office. Holroyd explained to the employees that he was interviewing them because of the charges and objections filed with the Board. He then proceeded to ask them whether their working rules had been changed in June 1967, and also whether any supervisor had (a) stated that the Union put Montgomery Ward out of business in Clarksburg, or (b) stated that Heck's would close before it let a union in, or (c) asked about attendance at a union meeting, or (d) asked how the employees would vote in the election. Holroyd noted the employees' answers on a mimeographed form he had prepared, and asked each of the interviewed employees to swear to and sign the completed form. Several employees declined to do so, and one (James McPherson) testified that Holroyd said, "I can make you sign."

2. Concluding findings

The threats, attributed to Jones, Pulice, and Haddad, that the store would close if the Union came in, would manifestly violate Section 8(a)(1) of the Act. In each case the employer-representative, called as a witness, denied the threat. Similarly, Morris denied questioning Marsh as to how Marsh intended to vote. These conflicts in the testimony I resolve in favor of General Counsel's witnesses, for reasons summarized below.

The various employee witnesses, whose testimony I credit, impressed me as testifying carefully, with high regard for the truth and with considerable corroborative detail. Also I note that in many instances their testi-

⁵ Company Vice President Darnall promptly dispatched a telegram to each of the other stores in the Heck chain, advising them that the Union had lost the election "by an overwhelming majority" and directing them to post the telegram on their bulletin boards. A similar telegram was sent from the Company's Kanawha City store to the Clarksburg store following a poll of the Kanawha City employees which Darnall conducted.

mony attributing illegal interrogation and threats to supervisors was consistent with statements that they gave (according to their uncontradicted testimony) to Company Counsel Holroyd when he interviewed them after the election.*

In contrast to the employee witnesses whom I credit, I found Jones, Pulice, and Haddad less than fully believable. In addition to the matter of demeanor I note the following: (1) Jones testified that she had never discussed the matters to which she testified with anyone, that she did not even know she was to testify at all until about 2:45 p.m. on the day she took the stand, and that when she called the store manager earlier that day he had said he did not know whether she would be called. The story strikes me as incredible, for Jones had repeatedly been named as a perpetrator of unlawful conduct as far back as the previous July, and she had figured prominently in the testimony of General Counsel's witnesses a week before she took the stand. Moreover company counsel had expected to finish his entire case by noon, so that if Jones' story is to be believed, but for the unexpected delay in finishing the Company's case, she would never have been called and the accusations against her would have gone un rebutted. Finally, Surock testified that the store manager told him at 9 a.m. that day that Surock, Jones, and another supervisor would be testifying that day, which casts some shadow over Jones' testimony that at noon the store manager was uncertain. These matters serve to reinforce the unfavorable judgment I formed of Jones' credibility. (2) Haddad parried an inordinate number of questions by saying "I don't recall," but managed to recollect that he had discussed with some employees the "rumor" that Montgomery Ward's closing was caused by the Union. His statement that he "kidded" with the employees furnishes no defense to a threat to transfer "bad girls," uttered in a context of antiunion statements. *A. P. Green Fire Brick Company v. N.L.R.B.*, 326 F.2d 910, 914 (C.A. 8). In any

* Employee Kimble's testimony was contrary to the statement she gave Holroyd. She repudiated that statement and explained twice that she was "very nervous" when Holroyd interviewed her.

event, I also credit the employees' testimony over Haddad's denial that he threatened to follow Montgomery Ward's example and close the store if the Union came in, and this statement alone would establish unlawful coercion by the Company. (3) I had more difficulty assessing the credibility of Pulice than I had in forming the conclusion that Jones and Haddad were not reliable witnesses. Pulice "explained" the surveillance attributed to him, because he recalled that on that day, some 9 months before he testified, he had left the store and started for home when he realized he had forgotten a package at the store, so that he returned to the store and then retraced his route toward home. This circumstance brought him past the union meeting place three times, and he thought he "probably looked over" to the group of employees there, although he averred that he had driven past at his normal rate of about 30 miles per hour. Indeed, Pulice's recollection of the events was so vivid that he remembered that on his way back to the store he passed a truck just as he went by the meeting place, so that he did not see the employees on that leg of his trip. As Pulice drives this route two or three times a day, and frequently passes trucks, his recollection of this particular vehicle as blocking his view suggests either a fabulous memory or some greater interest in the identity of those at the meeting place than he was willing to admit. In any event, to return to the question of Pulice's credibility *vis-a-vis* the employees who testified to his threats that the store would close if the Union came in, the testimony of Kimble, Jeffers, and Mason in describing their conversations with Pulice impressed me as truthful. I have credited their testimony in other respects, and while I am not as firm in my conviction that Pulice is to be discredited as I am in dealing with Jones and Haddad, I shall resolve this close issue in favor of the employee witnesses.

As to the similar threat which employee Marsh attributed to Vice President Darnall, I note that Marsh first testified she was "not sure" as to Darnall's comments because "it's been so long ago." When asked what Darnall had said "would happen if the Union came in,"

she replied: "The store might have to close down, I guess." In the light of this testimony, I credit Darnall's denial that he uttered the explicit threat. Darnall testified, however, that he had a conversation with Marsh the night before the election in which he explained the store's parlous existence in terms of its narrow margin of profit. Such a conversation, on the eve of an election between a highly placed company executive and a newly hired cashier of itself suggests that the employer representative was "campaigning" but I am not prepared to find that he overstepped the line between argument and threat. I credit Marsh's testimony that Morris interrogated her, however, for Marsh did not qualify her testimony with respect to Morris as she did with respect to Darnall, and Morris' overeagerness to deny all allegations, even before the question was asked, did not inspire confidence in her veracity. Also it is possible that Morris forgot her conversation with Marsh, for Morris apparently did not even recall later conversations with Holroyd.

As to the surveillance episode, discussed above, the Union cannot be heard to complain, if it chooses to hold its meetings in a prominent spot on a well-traveled road, merely because management representatives drive by, and even if they turn their heads toward the gathering. Pulice's explanation that he had to retrace his steps that evening and hence passed the spot three times is not so incredible as to require rejection. Pulice's recollection that a truck he was passing blocked his view suggests he had a high degree of interest in learning who was at the meeting place, although, if credited, it tends to support his estimate of his speed rather than the abnormally slow rate the employee witnesses attributed to him. In any event, I find that Pulice's presence in the area was occasioned by legitimate purposes of his own rather than by a desire to spy on the meeting. Similarly, Su-rock's alleged knowledge (which he denied) that the employees were having a union meeting at a bowling alley would not establish that he or anyone else in management had spied on the meeting. I therefore dismiss the allegation of unlawful surveillance.

Darnall's poll of the employees as to their pro or anti-union sentiments seems to be palpably illegal. This was not casual or isolated interrogation, but involved the employer's making of a written record as to the union views of every employee. Such polling, when held lawful, has always been by secret ballot, and the requirement here that the employee sign the "ballot" stamps the entire episode as illegal. See *N.L.R.B. v. Protein Blenders, Inc.*, 215 F.2d 749 (C.A. 8); *N.L.R.B. v. Roberts Brothers*, 225 F.2d 58 (C.A. 9); *N.L.R.B. v. Russell Kingston*, 172 F.2d 771 (C.A. 6).

The interviews which Holroyd conducted after the election apparently were for the lawful purpose of enabling the Company to meet the charge and the objections to the election. Nevertheless, certain important safeguards which the Board and the courts have said should accompany such interviews were lacking. I note, for example, that the employees were not assured that no reprisal would take place, that their participation was not on a voluntary basis, that they were asked to swear to an affidavit setting forth their answers to Holroyd's questions, and that at least one of them was so nervous as to give incorrect statements in response to Holroyd's inquiries. On the other hand, not all the employees called into the office answered Holroyd's questions, and of those who did, several refused to sign. Under all the circumstances, and considering also the general antiunion atmosphere, I find Holroyd's interviews exceeded legitimate bounds, because of his failure to reassure the employees that they were free not to cooperate without prejudice to their jobs and because he attempted to get them to swear to their statements. See *N.L.R.B. v. Neuhoff Brothers Packers, Inc.*, 375 F.2d 373, 377-378 (C.A. 5). The interviews by Holroyd, a company agent, in the presence of other company supervisors thus violated Section 8(a)(1), although the matter is somewhat cumulative in the light of Darnall's earlier unlawful poll. I find that McPherson misunderstood Holroyd, and that the latter did not say "I can make you sign."

In sum, I find that the threats of Jones, Haddad, and Pulice, the interrogation by Morris, the polling by Dar-

nall, and the postelection interviews by Holroyd constituted interference, restraint, and coercion in violation of Section 8(a)(1) of the Act.

B. *The Refusal to Bargain*

1. The Union's majority status

The Union made a telegraphic request of the Company for recognition on May 20, and repeated the request orally on June 13. Both requests were refused, as the Company expressed a doubt of the Union's majority and stated that the matter should be resolved by an election. By May 20, the Union had obtained cards from 19 of the 33 employees then in the bargaining unit,⁷ and by June 13, it held cards from 23 of the 38 then in the unit.⁸ The Company introduced testimony which, if fully credited and given its broadest possible sweep, would cause me to reject three or four of the Union's cards. For reasons developed below, I find that all cards, including those brought into question by the Company, were valid.

The Company produced two employee witnesses, Alice Neely and Avis Wetzel, who testified that they signed their cards after the union organizer told them, separately, they would lose their jobs if they did not. Neely, moreover, was accompanied in the interview with the union organizer by another employee, Evelyn Carpenter, who signed at the same time and, according to Neely, after the same threats. The fourth card under attack is that of employee Ursel Strosnider, who was confined to a hospital during the hearing, but who, the record suggests, would not have signed a card but for Wetzel's having done so. There is also a suggestion in the testimony that Strosnider told Neely that she (Strosnider) signed out of fear, but this is not probative evidence of Strosnider's motivation.

⁷ The stipulated bargaining unit includes all the employees in the Clarksburg store except for supervisors, guards, and professional employees.

⁸ The Union obtained 5 new cards between May 20 and June 13, but one of the original 19 had left the Company by the latter date.

Neely, whose credibility is difficult to assess in view of her admittedly nervous state while testifying, stated that for some days before they signed cards, she and Carpenter had been followed, as they drove through Clarksburg, by a car containing the union organizers. On one occasion, according to Neely, a rock struck her car, and she was sure it was thrown from the car following her. (I accept and credit the testimony of the union representatives that they did not engage in any car-following or rock-throwing, but I will accept Neely's statement that she believed these men had followed her car and thrown a rock. This may involve some stretching of credulity, for Neely also testified that she knew the union men wanted to see her as they had so informed her husband, and a normal person might reason that if they pursued so routine a method of approaching her they would not have resorted to shadowing, pursuing, and rock-throwing. But Neely did not impress me as "normal" and I will credit her testimony that she held this bizarre and unfounded belief.)

On May 18, at the suggestion of a fellow employee who supported the Union, Neely and Carpenter met with one or two fellow employees and the union organizers at a restaurant after work. Neely testified that before going to this meeting, she and Carpenter had decided to sign union cards "if they [the Union] had anything to offer us and various things like that when we talked it over, saw what they had to offer." During the conversation at this meeting, which lasted over an hour, Neely asked a number of questions dealing with possible union benefits, such as retirement and insurance, and how long she would have to be a member before obtaining these benefits. In the course of the conversation the union representatives told the two employees that when the Union became the bargaining representative and obtained a contract "after 30 days all employees at the place would belong to the Union."*

* I do not credit Neely's testimony that the organizers told her that if she failed to sign the card she "could lose [her] job with the Company."

A fair summation of Neely's testimony is that, whatever her fears may have been, she went to meet the union organizers, discussed possible union benefits at some length, learned that if the Union obtained a contract union membership would probably become a condition of employment, and signed the card. I find nothing in this to lead me to eliminate Neely, or her companion Carpenter, from the list of those supporting the Union at the time it claimed recognition. I note also that Neely marked Darnall's "ballot" as to show her support of the Union. Neely testified that she told Darnall at the time that she had signed a union card "under pressure." Darnall's testimony contains no mention of any such comment by Neely, and I credit the testimony of employee Davis that she overheard the exchange between Neely and Darnall and that no such remark was made. Neely's testimony reveals a determination, as of the date of the hearing, to oppose the Union, but her recollection of the events of the preceding May and June appears highly colored by her frame of mind at the time of testimony. This comment also applies to Wetzel, whose testimony is discussed below. Curiously both Neely and Wetzel positively named one of the union organizers who interviewed them as one Huffman, although the record conclusively establishes that the man in question was Carl Lambert, and that Huffman, another organizer, had left the city by the date in question. Why Neely swore the man was Huffman is not explained on the record, but Wetzel testified that her recollection to this effect had recently been refreshed by Holroyd. I note that Huffman's name did appear in the record and in exhibits received in evidence on the first day of the hearing, and that Wetzel and Neely did not testify until a week later. I do not believe that Neely willfully testified falsely, but her nervous condition and the general tenor of her testimony lead me not to credit her where there is probative evidence contrary to that which she gave.

Wetzel testified that in her meeting with the union organizers she first expressed fears, which they assuaged, that if she signed for the Union, the Company would discharge her. The meeting in Wetzel's home lasted over

90 minutes, and according to Wetzel she finally signed the card when the organizers told her that "the Union is going in . . . and when it gets in [she would] have to join the Union to keep [her] job." I credit the testimony of Lambert and Skaggs, the two union organizers, that they explained to Wetzel and to Neely that once the Union obtained recognition it expected to obtain a contract which would require employees to join in 30 days.

I find nothing in the above which suggests that the Union obtained Wetzel's card by improper means. Moreover, Wetzel apparently attended several union meetings, (even during inclement weather which kept others away) at which she spoke in favor of the Union, and she marked Darnall's "ballot" for the Union, although she explained to him she had been "more or less pushed into" signing a union card. Finally, Wetzel herself testified that she telephoned Strosnider while the union organizers were at Wetzel's house and said: "I signed. I don't know what you are going to do. If you want to sign, that's up to you. I suppose I might as well lose my job one way as well as another." This statement furnishes no basis for not including Strosnider's card as a valid designation of the Union.

In short, I find that all the cards held by the Union were valid designations, and that it represented a majority of the employees at the time it requested, and the Company refused, recognition.

2. The Company's asserted doubt of the Union's majority

On May 25 the Company relied to the Union's May 20 request for recognition, stating that "a majority of the employees have advised the Company that they did not desire your union to represent them," and adding that the Company had filed a petition with the Board so that the question of majority status could be determined by secret ballot. Again on June 13 the Company adhered to its determination to seek an election rather than to determine the Union's majority by card check, as the Union offered. The reference on May 25 to what the employees had told the Company was apparently a some-

what inaccurate representation of the results of Darnall's poll, which showed 11 for, 13 against, and 6 "no comment."

The Company in at least three preceding cases arising in other stores had been confronted with claims of union majorities, but in subsequent proceedings had successfully resisted the Union's attempt to obtain enforceable bargaining orders. See *Heck's, Inc.*, 159 NLRB 1151; 159 NLRB 1331; *N.L.R.B. v. Heck's, Inc.*, 386 F.2d 317 (C.A. 4) In the light of this background the Company's reluctance to recognize the Union pursuant to the latter's claim of a majority based on authorization cards is certainly understandable, to say the least. There is some evidence, denied by company witnesses, that Haddad believed as of July 6 that the Union had cards from a majority, but this would not distinguish this case from that reported at 159 NLRB 1331, 1334-35. The closeness of the vote obtained by Darnall in his poll might give rise to some question as to whether the Company doubted the majority in good faith, for the "no comment" votes under the circumstances might be interpreted as pro-union. Also, the fact that the Company engaged in unfair labor practices between the time of the bargaining request and the election may warrant an inference that it sought the election to gain time in which to dissipate the majority.

Although the record thus discloses some basis for a finding that the Company did not have a good-faith doubt of majority, I am not persuaded that the preponderance of the evidence leads to that result. I note that the Company did expedite the election by filing the petition, and I am particularly influenced by the fact that in prior cases the Company's challenge to card majorities proved well-founded. For reasons set forth below, however, I find that a bargaining order should issue to remedy the Section 8(a)(1) violations found above.

As already noted the Union did in fact represent a majority prior to the Company's unfair labor practices, and indeed lost the election by only a narrow margin after the Company committed various illegal acts. At least

six employees, nearly one-fifth of the entire bargaining unit, were threatened by supervisors that advent of the Union would result in closing of the store. (Even company witnesses Neely and Wetzel testified that employees were afraid of being discharged if the Company learned they signed union cards.) Under these circumstances it is reasonable to infer, and I do, that the unfair labor practices destroyed the Union's previously existing majority status. A proper remedy for those unfair labor practices is to restore the Union to its majority status, with the consequent imposition on the Company of a duty to recognize the Union and bargain with it upon request. See, e.g., *N.L.R.B. v. Delight Bakery, Inc.*, 353 F.2d 344, 347 (C.A. 6)

Conclusions of Law

1. The Company by interrogating its employees as to their union activity, polling them in a nonsecret ballot to ascertain which employees supported the Union, and threatening to close the store if the Union became the bargaining representative, engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act, and tended to dissipate the majority status which the Union enjoyed prior to the unfair labor practices.

2. By interviewing employees under coercive circumstances concerning matters relating to unfair labor practice charged and objections to an election the Company engaged in further unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

The Remedy

I shall, of course, recommend that the Company cease and desist from violating Section 8(a)(1) of the Act, and that it recognize and bargain with the Union as the representative of the Clarksburg employees.

As previously noted, the Company has a number of stores; it opened its 11th store during one of the recesses in this hearing. Its headquarters is in Charleston, West Virginia, and basic labor policy for all the stores is determined there by Messrs. Haddad, Darnall, and Holroyd.

That the Company itself recognizes a relationship between events occurring at different stores is shown by its conduct in immediately sending a telegram to all other stores, for posting on their bulletin boards, after the Union's defeat in the election at Clarksburg.¹⁰ Similarly the Company sent a telegram to its Clarksburg store to advise of the result of its own employee poll at its Kanawha City store. In the light of those facts, and in consideration of the fact that there are eight previous Board orders finding violations at various stores in the Heck's chain,¹¹ I believe that the order should be broad enough to restrain future violations of Section 8(a)(1) at any and all of the stores owned by Heck's. See *N.L.R.B. v. Heck's, Inc.*, 388 F.2d 668, 669 (C.A. 4).

The Union in its brief makes several suggestions as to further remedies. It asks that a general bargaining order issue covering all Heck's stores, so that (assuming court enforcement in this case) any postdecree refusal to bargain in any store will be at the risk of a contempt proceeding. Assuming *arguendo* that such relief might be appropriate in a proper case, I decline to recommend it here, as at this writing there is no outstanding judicially enforced bargaining order against the Company. Assuming that the order here recommended later becomes embodied in a court decree, a sufficiently virulent showing of a bad-faith refusal to bargain might lead to a contempt prosecution under the provisions of the order prohibiting interference with the Section 7 right to bargain collectively. The Union also asks that General Counsel be directed to seek injunctive relief in any future case involving Heck's. This matter should be left to case-by-case determination; General Counsel will not be unaware of the Company's history if subsequent complaints should issue, and the Union may make appropriate requests in

¹⁰ The telegram states that the employees voted by an "overwhelming" majority to reject the Union. As the actual vote was 19 to 16, the use of the term "overwhelming" suggests that the Company was engaging in propaganda at the other stores, and using the Clarksburg election for that purpose.

¹¹ See 150 NLRB 1565; 156 NLRB 760; 158 NLRB 121; 159 NLRB 1151; 159 NLRB 1331; 166 NLRB Nos. 32, 38; 170 NLRB No. 53.

such cases. The Union asks that in future cases against Heck's the Company should shoulder the burden of proving that it had a good-faith doubt of majority. I have grave doubt that the Board has power to shift the burden of proof in cases not yet before it.

With respect to this particular case the Union urges that the Company be required to bargain over the conditions of employment prevailing from the date of the violation to the effective date of the new contract. I see no need to particularize this part of the remedy, for the Union is free to bargain over the effective date and can therefore bargain for retroactivity. Cf. *Independent Drugstore Owners of Santa Clara County*, 170 NLRB No. 195. Finally, I decline to recommend that the Union be reimbursed for its expenses in filing the charge in this case, or in participating in the litigation. See *M.F.A. Milling Company*, 170 NLRB No. 111, TXD, "The Remedy."

Finally, in the light of the foregoing and in view of the bargaining order recommended in this case, I find it unnecessary to pass upon certain additional conduct alleged to have affected the results of the election. I recommend that the election be set aside and the representation proceeding be vacated.

Accordingly, upon the foregoing findings and conclusions, and upon the entire record in this case, I recommend, pursuant to Section 10(c) of the Act, issuance of the following:

ORDER

A. Respondent Heck's, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist at each and all of its stores from interrogating employees as to their union membership, sympathies, or activities; threatening employees that choice of a union as their collective-bargaining representative would lead to the closing of the store; or in any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively (as defined in Section 8(d) of the Act) with Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL-CIO, as the representative of all employees of the Respondent's Clarksburg, West Virginia, store, excluding supervisors, guards, and professional employees.

(b) Post at each of its retail stores, copies of the attached notice marked "Appendix."¹² Copies of such notice on forms provided by the Regional Director for Region 6, after being duly signed by an authorized representative of the Respondent, shall be posted immediately upon receipt thereof, and shall be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Decision, what steps the Respondent has taken to comply herewith.¹³

B. The election in Case 6-RM-326 is set aside, and that proceeding is hereby vacated.

Dated at Washington, D.C. May 7, 1968

[Certified True Copy
O. W. Fields
Executive Secretary, NLRB
Date May 7, 1968]

¹² In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

¹³ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

All our employees have the right to self-organization, to form, join, or assist labor unions, and to bargain collectively through representatives of their own choosing.

WE WILL NOT threaten to close any store because our employees select a union to represent them, or question our employees concerning their union sympathies or activities or membership, or in any other manner interfere with their exercise of those rights.

WE WILL recognize Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL-CIO, as the bargaining representative of the employees in our Clarksburg, West Virginia, store. At the request of that Union we will bargain with it in good faith with respect to the terms and conditions of employment of the employees in that store, and we will embody in a signed contract any agreement reached.

HECK'S, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1536 Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222, Telephone 644-2977.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,318

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347,
AMALGAMATED MEAT CUTTERS AND BUTCHER
WORKMEN OF NORTH AMERICA, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 22,414

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HECK'S INCORPORATED, RESPONDENT
FOOD STORE EMPLOYEES, UNION, LOCAL 347, ETC.,
INTERVENOR

On Petition for Review and Application for
Enforcement of an Order of the National
Labor Relations Board

Decided May 4, 1970

Miss Judith A. Lonnquist, with whom *Messrs. Mozart G. Ratner* and *Albert Gore* were on the brief, for petitioner in No. 22,318 and intervenor in No. 22,414.

Mr. Baruch A. Fellner, Attorney, National Labor Relations Board, for petitioner in No. 22,414 and respondent in No. 22,318. *Messrs. Arnold Ordman*, General Counsel, National Labor Relations Board, *Dominick L. Manoli*, Associate General Counsel, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, were on the brief, for petitioner in No. 22,414 and respondent in No. 22,318.

Mr. Frederick F. Holroyd for respondent in No. 22,414.

Before: BAZELON, Chief Judge, MCGOWAN and LEVENTHAL, Circuit Judges.

PER CURIAM: This case arises on petitions to review and to enforce an order of the National Labor Relations Board against Heck's Inc., relating to its store at Clarksburg, West Virginia. The Board found (1) that Heck's had violated § 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 158(a)(1)) by unlawfully questioning and threatening its employees concerning the Food Store Employees Union ("the Union") and by polling its employees by non-secret ballot to determine their support for the Union; (2) that Heck's had violated § 8(a)(1) and § 8(a)(5) of the Act (29 U.S.C. §§ 158(a)(1), 158(a)(5)) by refusing to bargain with the Union despite the existence of valid cards showing a majority of the store's employees as favoring the Union; and (3) that the appropriate remedy for Heck's refusal to bargain was an order to bargain.¹ The Board's decision and order are reported at 172 NLRB 255.

Heck's contends that the evidence was insufficient to support the Board's findings and that the order to bargain was inappropriate. The Union urges that the relief provided by the Board was insufficient to overcome the harm inflicted.

It is not necessary to review the evidence in detail in this opinion. The decision of the Board (including that of the Examiner) has already done so, and we find that the evidence there recited is supported by the record and more than meets the substantial evidence test for upholding Board findings.² Similarly, the Board's remedy falls

¹ The Board's order contains a few other times, most important of which are those dealing with protection of Heck's employees from interrogation and denial of section 7 rights. These remedies are clearly appropriate.

² General Teamsters and Allied Workers v. NLRB [*Pennsylvania Glass Sand Corp.*], Nos. 22,072, 22,762, 138 U.S.App.D.C. 312, 427 F.2d 582 (April 7, 1970); Oil, Chemical and Atomic Workers Local 4-243 v. NLRB [*Allied Chemical Corp.*], 124 U.S.App.D.C. 113, 116 362 F.2d 943, 946 (1966).

well within the scope of its expertise and discretion as far as it goes.³

³ The Board's opinion in this case made findings which meet the requirements subsequently set forth in *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969) (requiring a finding of more than simple bad faith in order to justify a Board order requiring an employer to bargain without an election). Over and above the finding of bad faith the Board found:

In any event the Respondent's extensive Section 8(a)(1) violations, on which it embarked at about the time the Union attained its majority status *and which made a free and fair election impossible*, justify an order requiring the Respondent to bargain with the Union upon request as an appropriate remedy for the Respondent's 8(a)(1) violations. [Emphasis added.]

The italicized finding is similar to findings held by the Supreme Court to warrant enforcement of a bargaining order in the *Sinclair* portion of the *Gissel* case. 395 U.S. at 615.

In *Food Store Employees Union v. NLRB* [*Heck's St. Alban's*], 135 U.S.App.D.C. 341, 418 F.2d 1177 (1969), involving the same parties, this court remanded the case for reconsideration by the Board. At one point the Examiner in that case, rejecting the employer's contention that authorization cards were too unreliable as proof of majority status to permit a finding that the Union was the employee's designated bargaining representative, said:

It is also a familiar rule of law that when the party calling for the best evidence of a fact has itself made the production of such evidence impossible, it cannot complain that proof of that fact is made by secondary, but probative, evidence. Here Respondent by its own actions made impossible the ascertainment of its employees' desires as to representation in the atmosphere of a free and fair election, and thus may not be heard to complain if that fact is ascertained through other probative evidence.

This court acknowledged that it was possible that the requisite findings were "implicit" in the Board's decision (135 U.S.App.D.C. at 348, 418 F.2d at 1184). However, the language quoted above was the only reference by the Board to the impossibility of free elections, and it appeared in the midst of a 21-page discussion of the case by the Trial Examiner, adopted, by reference, in the Board's opinion. It appeared as an additional evidentiary-type reason why majority status could be predicated on cards (then an undecided legal issue). There was no clear-cut finding of impossibility as a finding of ultimate fact with the intention that the finding be the predicate and justification for a bargaining order.

In the case at bar the Board explicitly found that the employer's violations of section 8(a)(1) has made free and fair elections im-

The Board found bad faith on the part of Heck's in refusing to bargain with the Union, basing that conclusion in part on "flagrant repetition of conduct previously found unlawful" at other Heck's stores.⁴ Since 1964 Heck's has been the object of nine unfair labor practice proceedings,⁵ which show, in the Board's words, "a labor policy in all of its stores that is opposed to the policies of the Act." The Board's findings of bad faith and flagrant misconduct lead us to remand this case to the Board for reconsideration, in light of our recent decision in *Tiidee Products*,⁶ of the Union's request for further relief.⁷

possible as one of the ultimate findings justifying the issuance of a bargaining order. That is all that *Gissell-Sinclair* contemplates, and there is accordingly no reason for our remand on other grounds to postpone the date on which the order becomes enforceable by contempt actions.

⁴ Although the conduct referred to took place at other stores, the president and vice president of the company were involved in each of the disputes mentioned.

⁵ See 150 NLRB 1565 (1965), *enforced per curiam*, 369 F.2d 370 (6th Cir. 1966); 156 NLRB 760 (1966), *enforced as modified*, 386 F.2d 317 (4th Cir. 1967); 158 NLRB 121 (1966) and 159 NLRB 1331 (1966), *consent decree entered* (4th Cir., No. 11,390, June 13, 1967); 166 NLRB 186 and 166 NLRB 674 (1967), *enforced as modified*, 390 F.2d 655 (4th Cir. 1968), *cert. granted*, 37 U.S.L.W. 3219 (1968); 170 NLRB No. 53 (1968), *enforced in part, remanded in part in light of NLRB v. Gissell Packing Co.*, 395 U.S. 575 (1969), 135 U.S.App.D.C. 341, 418 F.2d 1177 (1969); 171 NLRB No. 112, Nos. 22,183, 22,284, *remanded by order*, August 11, 1969.

⁶ *International Union of Electrical, Radio and Machine Workers v. NLRB [Tiidee Products, Inc.]*, Nos. 22,797, 22,911, 138 U.S.App. D.C. 249, 426 F.2d 1243 (April 3, 1970). The Board's order in the case before us was entered before our decision in *Tiidee Products, Inc.*

⁷ The Union requested a broad range of further relief: the mailing of notices to employees (the Board's order called only for posting notices); a company-wide bargaining order; shifting of the burden of proof in future cases to require Heck's to show good faith in rejecting Union cards; injunctions under section 10(j) of the Act; greater Union access to employees; make-whole compensation for lost collective bargaining benefits; and Union expenses to overcome the effects of the Company's unlawful refusal to bargain.

The Board's application for enforcement of the order is granted. On the Union's petition for review, the case is remanded for proceedings consistent with this opinion.

So ordered.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 9-CA-4440
9-CA-4488
9-CA-4536
9-CA-4563

TIDEE PRODUCTS, INC.

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND
MACHINE WORKERS, AFL-CIO-CLC

SUPPLEMENTAL DECISION AND ORDER

On February 24, 1969, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding, finding that Respondent had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended.¹ The Board, *inter alia*, ordered Respondent to bargain with the Union upon request, but it did not grant the Union's proffered broader remedial order. The Union sought backpay to make the employees whole for wages and benefits lost due to Respondent's unlawful refusal to bargain, and reimbursement for lost initiation fees and dues.

Thereafter, on April 3, 1970, the United States Court of Appeals for the District of Columbia Circuit enforced in full the Board's Order.² However, upon the Union's petition for review of the Board's Order, the court remanded these cases for further proceedings not inconsistent with its opinion. The Board, having accepted the remand issued a notice to the parties requesting state-

¹ 174 NLRB No. 103.

² *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. N.L.R.B.*, 426 F.2d 1243 (C.A. D.C.), rehearing denied, F.2d (C.A. D.C.) (September 21, 1970), cert. denied, 400 U.S. 950.

ments of position. The Union and Respondent each filed such statements.³

The Board has given full consideration to the views of the court of appeals as expressed in the instant proceeding and the parties' contentions in their respective statements of position. For the reasons more fully set forth hereinafter, the Board has concluded that it would effectuate the policies of the Act to grant some but not all of the requested additional relief.

The Union asserts that the court of appeals' conclusion that the Board has the power under the Act to issue a make-whole remedial order is the "law of the case." It contends, moreover, that under the circumstances of these cases the Board should exercise that power and either determine on the record before the Board what dollar amount, if any, is necessary to make whole each employee for all losses sustained due to Respondent's unlawful refusal to bargain or remand this proceeding to a Trial Examiner for a hearing to determine that question. The Union also seeks organizational expenses, litigation costs, reimbursement for lost initiation fees and dues, and any other remedies that would effectuate the policies of the Act.

Respondent contends that the court of appeals erred in questioning the Board's determination not to award additional relief. Respondent argues that no additional relief is warranted; it would have the Board merely reiterate its previously announced conclusion that the Act does not empower the Board to issue a make-whole order.⁴

³ The Union filed a motion to consolidate this proceeding with those cases comprising *Tiidee Products, Inc.*, 176 NLRB No. 133, enfd. and remanded, 440 F.2d 298 (C.A. D.C.). We find no merit in the Union's contentions and its motion is hereby denied.

⁴ See *Ex-Cell-O Corporation*, 185 NLRB No. 20, enfd. *sub nom. International Union United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. N.L.R.B.*, 449 F.2d 1046 (C.A. D.C.) 449 F.2d 1058 (C.A. D.C.), and *Heck's, Inc.*, 191 NLRB No. 146. In the aforementioned cases the refusals to bargain rested upon "debatable questions" concerning the validity of the underlying representation determinations whereas here the court of appeals found that Respondent raised a frivolous question when it objected to certain union preelection conduct allegedly affecting the

In its Decision, the Board found that Respondent had violated Section 8(a)(1), (3), and (5) of the Act. As a remedy for the 8(a)(5) violation, the Board ordered Respondent to bargain collectively with the Union upon request. The Board rejected the Union's request that in addition to the traditional cease-and-desist order Respondent be required to make the employees whole for monetary losses suffered as result of the unlawful refusal to bargain.

In *Ex-Cell-O* the Board majority enunciated its conclusion that Congress did not give the Board statutory authority to grant the compensatory monetary remedy requested by the Union. The court of appeals disagreed with this view of the scope of the Board's statutory remedial power and it remanded these cases to the Board for further proceedings not inconsistent with the court's opinion. Although the Board adheres to the views expressed in *Ex-Cell-O*, inasmuch as it has accepted the remand, it considers itself bound by the court's opinion as the "law of the case."

A close analysis of the court's opinion reveals that the court did not decide that the Board must issue a make-whole remedial order in these cases. It did, however, question the adequacy of the conventional bargaining order under the circumstances of this proceeding:

We cannot discern, and the Board has not explained, on what basis it could or did conclude that its order under review is designed "to insure meaningful bargaining."⁵

The court noted that the bargaining order herein was "counter-productive" and actually rewarded Respondent's refusal to bargain during the critical period following the Union's certification as the collective-bargaining representative. Thus, the court stated, during the delay in bargaining Respondent enjoyed lower labor expenses and probably will continue to do so in the future because the

results of the election and thereafter contested the Regional Director's refusal to order a hearing on the objection.

⁵ 426 F.2d at 1249.

Union, probably having lost the allegiance of a majority of the unit employees, will not be able to bargain effectively. The court suggested that the Board consider other remedies to "prevent the employer from having a free ride during the period of litigation."⁶ Finally, the court concluded that the bargaining order encourages frivolous litigation before the Board and the courts.

The court urged the Board to consider the advisability of a make-whole remedy:

... which could be measured not by any sentiment as to what the parties *should* have agreed to, but only by a determination, on the basis of all the evidence available, of what it is likely that parties *would* have agreed to . . .⁷

had they engaged in the kind of bargaining required by the Act. But the court also entered a caveat that it was not suggesting that the make-whole remedy would be appropriate "under circumstances in which the parties would have been unable to reach agreement by themselves."⁸ Finally, the court stated:

... we accompany our remand with a directive to make supplementary findings in the event the Board determines on remand that it should not grant any make-whole relief in whole or in part. If the Board believes that alternative remedies,¹⁵ beyond those already granted, are more appropriate, it should so state. The assessment of these matters is for the Board.

¹⁵ The scope of the Board's consideration on remand, if it is deemed that the Union's proposal goes too far, would include consideration of such lesser, alternative remedies as an award for excess organization costs caused by the Company's behavior, or for the costs of having to litigate a frivolous case, or for a combination of these.⁹

⁶ *Id.* at 1251.

⁷ *Id.* at 1252.

⁸ *Id.* at 1253.

⁹ *Ibid.*

We have carefully considered the Union's request for a make-whole remedy in light of the record herein and have decided that it is not practicable. The Union suggests that we determine what the parties "*would* have agreed to" in 1967 and thereafter on the basis of a record which contains only a proposed collective-bargaining agreement submitted by the Union to Respondent on December 18, 1967; a chart comparing the wages then paid by Respondent for certain job classifications with those paid by other employers in comparable industries in the Dayton area who were then under contract with the Union; testimonial evidence of employee wage rates as of the date of the hearing herein and a list thereof as of May 25, 1970; certain testimony about the time required to negotiate a first contract; and several charts and tables depicting nationwide changes in wages and benefits since 1967. We know of no way by which the Board could ascertain with even approximate accuracy from the above what the parties "*would* have agreed to" if they had bargained in good faith.¹⁰ Inevitably, the Board would have to decide from the above what the parties "*should* have agreed to." And this, the court stated, the Board must not do.

Alternatively, the Union suggests that the Board remand his proceeding to a Trial Examiner apparently without standards for a hearing to devise a "make-whole" formula for backpay to be awarded employees, if any. This would result in long delay while these cases wound their way through the Trial Examiner, the Board, and, ultimately, the courts. Meanwhile, Respondent, which is under order to bargain with the Union, is not likely to agree upon any new wage benefits for employees for fear that the Board would give them retroactive effect in devising a backpay formula for the past refusal to bargain. This would further delay the commencement of meaningful collective bargaining and thus not effectuate the purpose of the Act.

¹⁰ In his dissent, Judge MacKinnon noted, "the history of this case seems to make it clear that the most realistic prediction would be that the parties would not have agreed to anything. Any other conclusion is difficult to reach in light of the Company president's 'antiunion animus' and the 'patently frivolous' objections to the election." *Id.* at 1256.

However, while we find that it would be counterproductive to grant the Union's request for a remand to a Trial Examiner, the Board believes that the alternative remedies provided hereinafter will undo some of the baneful effects pointed out by the court as having resulted from Respondent's "clear and flagrant violation of the law."¹¹ They will, for one, aid the Union in rebuilding its strength so that it may bargain effectively with Respondent. Also, by requiring Respondent to pay some of the Board and union litigation costs occasioned by its misconduct, similar "brazen" refusals to bargain will be discouraged. Although these remedies are not theoretically perfect, we believe that they are as far as we can go in the circumstances.

1. In the ordinary unfair labor practice case, the notice to employees which accompanies the Board's order is posted for 60 days at the employer's place of business. However, to assure that the employees involved here fully and carefully read the notice, that Respondent's new employees unfamiliar with the history of the instant proceeding understand the reasons for the delay in collective-bargaining negotiations, and that the unit members realize that the Government protects their Section 7 right to select a collective-bargaining representative, we shall require that copies of the posted notices be mailed to each of the employees in the unit at his home.¹²

2. Given all the circumstances of the instant proceeding and those of *Tiidee Products, Inc.*, *supra*, note 3, it is clear that the Union in essence will have to "reorganize" the unit employees despite its outstanding Board certification prior to commencing collective-bargaining negotiations with Respondent.¹³ In order that the employees may

¹¹ *Id.* at 1248.

¹² *Cf. Heck's Inc.*, 191 NLRB No. 146.

¹³ We agree with our concurring colleague that the Board should neither concern itself with "how many dues-paying members the Union is able to obtain" nor "indicate that this impartial and neutral Agency has any view as to whether the employees ought to join or not join either this or any other union." However, our concurring colleague misconstrues the purpose of our Decision. All that we are doing is restoring to the duly certified collective-

have free and ready access to information from the Union concerning all aspects of unionization and the collective-bargaining negotiations which should occur in the immediate future, the Board will order that the Union be given reasonable access to Respondent's bulletin boards and other places where notices to employees are customarily posted, during the period of contract negotiations, for the posting of union notices, bulletins, and other literature.¹⁴

Similarly, and especially during the period prior to the commencement of negotiations, the Board finds that it would facilitate the Union's reclaiming the allegiance of the unit employees if it were able to meet with the individuals involved in order to explain to them the circumstances of the instant proceeding and the Union's plans for the future. While several methods for achieving this objective are available, we find least burdensome on all the parties the requirement that Respondent furnish the Union with a list of names and addresses of its employees and keep said list current for a 1-year period. Accordingly, we shall order Respondent to furnish the Union with such lists for 1 year from the date of this Supplemental Decision.

3. The Union asserts that an award to it of organizational expenses, litigation costs and expenses, and lost initiation fees and dues would meet another of the court of appeals' objections to the Board's order; viz, that our traditional remedy rewarded Respondent's delaying tactics and increased the likelihood that similar frivolous litigation would clog future Board and court calendars.

It is clear that the Union incurred no extraordinary organizational expenses because of Respondent's patently

bargaining representative the opportunity to achieve again, via a readier route, what it had previously obtained by its own efforts, but then lost through Respondent's frivolous litigation. Moreover, as the court noted, our already enforced bargaining order would not insure meaningful collective bargaining unless the Union were given the opportunity to regain the allegiance of a majority of the unit employees.

¹⁴ Cf. *Heck's, Inc.*, *supra*, fn. 20, and *J. P. Stevens & Co., Inc.*, 171 NLRB No. 163, *enfd.* 417 F.2d 533 (C.A. 5).

frivolous objection to the election and subsequent refusal to bargain. Despite certain already remedied preelection unlawful Respondent conduct, the Union was selected by the employees after a 2-month campaign at the first election held. We find, therefore, no nexus between Respondent's unlawful conduct here under examination and the Union's preelection organizational expenses and, accordingly, we shall not award them to the Union.

The Union asserts that because it is union policy not to collect initiation fees and dues until a contract is executed, it has received nothing from the unit employees throughout the course of this proceeding. It therefore now seeks to recover the initiation fees and dues lost due to Respondent's refusal to bargain. We view this claim as partaking of a request for a make-whole remedy, which we have declined to order, since presumably the dues and fees sought would have come from lost wages. Moreover, since it is union policy to chance the loss of initiation fees and dues in *all* cases until a contract is negotiated, if ever, we find no reason to have Respondent assume that risk at this point. Clearly, the Union during the instant proceeding could have elected to assess its members for dues and fees.¹⁵

We find merit, however, in the Union's request that it be reimbursed for certain litigation costs and expenses. Normally, as the Board recently noted, litigation expenses are not recoverable by the charging party in Board proceedings even though the public interest is served when the charging party protects its private interests before the Board.¹⁶

We agree with the court, however, that frivolous litigation such as this is clearly unwarranted and should be kept from the nation's already crowded court dockets, as well as our own. While we do not seek to foreclose access to the Board and courts for meritorious cases, we likewise do not want to encourage frivolous proceedings. The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy

¹⁵ See fn. 13, *supra*.

¹⁶ *Heck's, Inc.*, *supra*, fn. 20.

access to uncrowded Board and court dockets is available. Accordingly, in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper to order Respondent to reimburse the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of these cases, including the following costs and expenses incurred in both the Board and court proceedings: reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses. Accordingly, we shall order Respondent to pay to the Board and the Union the above-mentioned litigation costs and expenses.¹⁷

As we have concluded that it would best effectuate the policies of the Act to require Respondent to take certain action in addition to the action previously ordered, we shall issue the following:

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Tiidee Products, Inc., Dayton, Ohio, its officers, agents, successors, and assigns, shall take the following affirmative action in addition to that previously ordered which the Board finds will effectuate the policies of the Act:

(a) Mail a signed copy of the attached revised notice marked "Appendix" to each of its employees immediately upon receipt thereof from the Regional Director for Region 9.

(b) Upon request of the Union, made within 1 month of the date of this Supplemental Decision, immediately grant the Union and its representatives reasonable access, for the period of the collective-bargaining negotiations, to its bulletin boards and all places where notices to employees are customarily posted.

¹⁷ See also Rule 38, Federal Rules of Appellate Procedure. Cf. *Sprague v. Ticonic National Bank*, 307 U.S. 161, 166; *Schauffler v. United Association of Journeymen*, 246 F.2d 867 (C.A. 3, 1957).

(c) Upon request of the Union, made within 1 month of the date of this Supplemental Decision, make available to the Union a list of names and addresses of all employees currently employed and keep such list current for a period of 1 year thereafter.

(d) Pay to the Board and the Union the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of these cases before the National Labor Relations Board and the courts, such costs to be determined at the compliance stage of these proceedings.

Dated, Washington, D.C. January 24, 1972

John H. Fanning,	Member
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Howard Jenkins, Jr.,	Member
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Ralph E. Kennedy,	Member
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NATIONAL LABOR RELATIONS BOARD

[SEAL]

CHAIRMAN MILLER, Concurring:

I concur fully with my colleagues in their conclusions as to what additional remedies should be ordered herein.

I have, however, somewhat separate views as to rationale, as indicated below.

The Union is entitled to bulletin board use, in my view, only as a remedy for the interruption in communication between the Union and the employees which has been occasioned by Respondent's frivolous resort to extended litigation. For the same reason, I concur in the order requiring that Respondent furnish the Union with a current list of employee names and addresses.

To the extent, however, that my colleagues indicate that their purpose in providing this remedy is affirmatively to ally this Board with the Union's "reorganizational" efforts, I must dissociate myself from their views. We have a legitimate purpose in implementing the original choice by the employees in selecting this Union as a bargaining agent and in assuring that there is full opportunity for communication with the employees. But it is not our function, as I see it, to concern ourselves with how many dues-paying members the Union is able to obtain, nor to indicate that this impartial and neutral Agency has any view as to whether the employees ought to join or not join either this or any other union. It is, therefore, *not* part of *my* reason for joining in these remedies, "to facilitate the Union's reclaiming the allegiance of the unit employees," as the majority puts it.

I would also differ with my colleagues, in some degree, with respect to their rationale for denying the requested relief for dues which it did not receive from employees. They seem to have been persuaded, in part at least, by the Union's policy of waiving dues and initiation fees during the organizational period. That, to me, is unimportant, and, furthermore, I would not wish to suggest that we might reach a different result if the Union had not had such a policy, since I do not think it proper for this Board, perhaps unwittingly, to allow our processes to influence unions in an area in which they should be free to make such policy choices wholly apart from any con-

siderations of how they might affect out determination in any Board proceeding.

In this area, too, my reason for denying the relief is simply that we have no legitimate interest in how many dues-paying members a union can attract. Our only interest, to repeat what I have said earlier in this opinion, is to implement the majority choice of representative which was made in the election. It is *not* to insure that the Union has either a large or small membership, nor that it should obtain from the work force a large or small amount of dues or initiation fees. We are *not* providing damages for any private interests of the Union which may have been injured by the illegal employer conduct or by its frivolous resort to litigation. We *are* protecting employees' Section 7 rights and the integrity of our own processes. But whether the Union or any other organization lost revenue as an incident of violations of our Act is relevant, if at all, only in a private law suit, and not in a forum designed only to protect and enforce public policy.

The reimbursement of the Union and the Board for costs and expenses is in a different category. Since violation of our Act can be asserted only by private parties' charges, if they are forced to make such charges and to participate in extended proceedings by a respondent's frivolous resistance to the orderly application of our Act, I believe this to be a suitable remedy and one necessary for the protection of the public interest.

Dated, Washington, D.C.

Edward B. Miller, Chairman
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has told us to post and mail this notice about what we are committed to do.

The Act gives all employees these rights:

- To organize themselves
- To form, join, or help unions
- To bargain as a group through a representative of their own choosing
- To act together for collective bargaining or other mutual aid or protection
- To refuse to do any and all of these things.

We assure all of our employees that:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT threaten our employees with plant closure, or discharge, or with any other types of reprisals because they have selected International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, as their exclusive bargaining representative.

WE WILL NOT attempt to get employees to inform on the union activities and desires of their fellow employees.

WE WILL NOT unlawfully interrogate employees concerning their union membership, activities, or desires, nor will we unlawfully poll our employees in order to discover their sentiments about the Union.

WE WILL NOT lay off employees because they selected the Union as their collective-bargaining representative.

WE WILL NOT discharge employees because they selected the Union as their collective-bargaining representative.

WE WILL NOT discriminatorily change terms and conditions of employment because employees voted in favor of union representation, or in order to discourage membership in the Union.

WE WILL NOT refuse to bargain collectively with the above Union as the certified collective-bargaining representative of the employees in the following unit:

All production and maintenance employees at our Dayton, Ohio, plant, excluding all office clerical employees, technical employees, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to furnish the Union with information that will enable it to function as the bargaining representative of our employees in the above unit.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under the Act.

WE WILL make whole Virginia Sawmiller and Wanda Reagan for any loss of earnings they may have suffered by reason of their discriminatory discharges.

WE WILL recall and make whole all employees who were discriminatorily laid off by us.

WE WILL notify any of our employees if currently in layoff status and if presently serving in the Armed Forces of the United States of their rights to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

WE WILL bargain collectively with the above Union as the duly certified collective-bargaining representative of our employees in the above unit and, if an understanding is reached, we will sign a contract with the Union.

WE WILL mail a signed copy of this notice to all our employees.

WE WILL grant the Union reasonable right to utilize our bulletin boards during negotiations.

WE WILL, upon the request of the Union, immediately give to the Union a list of names and addresses of all our employees, and **WE WILL** keep the list current for a period of 1 year.

WE WILL reimburse the Union and the National Labor Relations Board's General Counsel for their costs and expenses in connection with this proceeding.

THIDEE PRODUCTS, INC.
(Employer)

Dated _____

By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provision may be directed to the Board's Office, Federal Office Building, Room 2407, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513-684-3686.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1550

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347,
AMALGAMATED MEAT CUTTERS AND BUTCHER
WORKMEN OF NORTH AMERICA, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

MOTION OF PETITIONER TO LODGE NEW
DECISION OF NLRB

Now comes petitioner and respectfully moves for leave to lodge with the Clerk four copies (enclosed herewith) of the supplemental decision and order of the NLRB in a related case, *Tiidee Products Inc.*, 194 NLRB No. 198, following remand from this Court, *International Union of Electrical Radio & Machine Workers, AFL-CIO v. NLRB*, — U.S. App. D.C. —, 426 F. 2d 1423, rehearing denied, — F. 2d — (Sept. 21, 1970), cert. denied, 400 U.S. 950. The Board's supplemental decision and order was issued January 24, 1972, and reported unofficially January 31, 1972 (79 LRRM 1175), a month after petitioner's reply brief herein had been filed.

For the reasons set forth in the accompanying memorandum, this motion should be granted.

Respectfully submitted,

/s/ Mozart G. Ratner
MOZART G. RATNER
818 - 18th Street, N.W.
Washington, D. C. 20036

JUDITH A. LONNQUIST
201 North Wells Street
Chicago, Illinois 60606

CERTIFICATE OF SERVICE

Two copies of the foregoing Motion of Petitioner to Lodge New Decision of NLRB and accompanying Memorandum have been served by hand this 2nd day of March, 1972 upon:

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue N.W.
Washington, D. C.

/s/ **Mozart G. Ratner**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1971

No. 71-1550

[Filed Mar. 3, 1972, United States Court of Appeals for
the District of Columbia Circuit, /s/ Nathan J. Paulson]

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347,
AMALGAMATED MEAT CUTTERS AND BUTCHER
WORKMEN OF NORTH AMERICA, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Before: Bazelon, Chief Judge

ORDER

On consideration of petitioner's motion for enlargement of time for oral argument, and of the motion of petitioner to lodge a new decision of the National Labor Relations Board, it is

ORDERED that each side in the above case is allotted 40 minutes for oral argument rather than 30 minutes and it is

FURTHER ORDERED that petitioner's aforesaid motion to lodge a new decision of the National Labor Relations Board is granted.

[Received Apr. 1, 1972]

SUPREME COURT OF THE UNITED STATES

No. 73-370

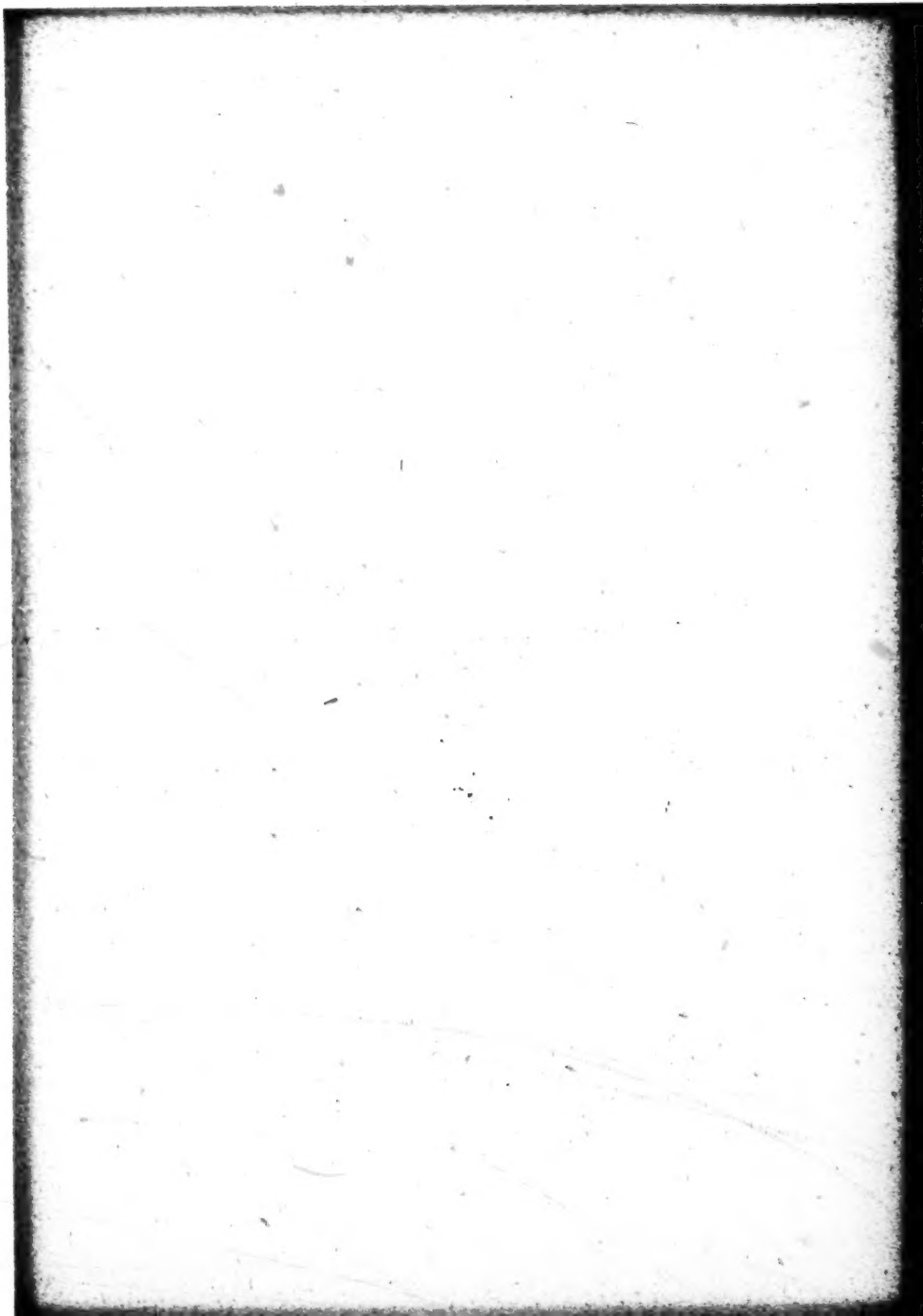
NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FOOD STORE EMPLOYEES UNION, LOCAL 347, ETC.

ORDER ALLOWING CERTIORARI—Filed December 3, 1973

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.



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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the portion of the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case that enlarged the remedies ordered by the Board.

OPINIONS BELOW

The opinion of the court of appeals (App. 1A-17A)¹ is reported at 476 F. 2d 546. The supplemental decision and order of the Board (App. 26A-44A) are reported at 191 NLRB No. 146. The earlier decisions of the court of appeals and of the Board

¹"App." refers to the appendix to this petition.

are reported at 433 F. 2d 541 and 172 NLRB 2231, respectively.

JURISDICTION

The judgment of the court of appeals (App. 18A-23-A) was entered on April 26, 1973. The Board's timely petition for rehearing was denied on May 30, 1973 (App. 25A). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a remedial order of the National Labor Relations Board which is challenged by the charging party as inadequate to effectuate the purposes of the Act is entitled to the same respect by a reviewing court as an order challenged as going further than necessary to effectuate those purposes.

2. Whether the court of appeals exceeded its authority as a reviewing court by substituting its judgment for that of the Board concerning the appropriate remedy for unfair labor practices.

STATUTE INVOLVED

Section 10 of the National Labor Relations Act, 61 Stat. 146, 73 Stat. 544, as amended, 29 U.S.C. 160, provides in part:

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such

person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States * * * for the enforcement of such order * * *. Upon the filing of such petition, the court * * * shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * *

STATEMENT

A. THE INITIAL PROCEEDINGS

This case was twice before the Board. In the first instance, the Board determined that Heck's, Inc., had engaged in unfair labor practices in resisting, at its Clarksburg, West Virginia, retail store, the organizational drive of the respondent union. The Board found that Heck's had violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by interrogating and threatening employees concerning the union and by polling employees by a non-secret ballot to determine their support for the union, and that it had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to recognize and bargain with

the union despite the existence of valid authorization cards from a majority of the employees.² (172 N.L.R.B. 2231.)

The Board ordered Heck's to cease and desist from interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. The Board also ordered the company to bargain with the union as the representative of the employees at its Clarksburg store and to post appropriate notices at each of its 11 stores (172 NLRB at 2232-2233, 2239). The Board denied the union's request for additional remedies, finding it "inappropriate in this proceeding to depart from our existing policies with respect to remedial orders" (*id.* at 2231, n. 2).

The court of appeals enforced the Board's order against the company (433 F. 2d 541). It remanded the case to the Board, however, for reconsideration of the union's request for additional remedies,³ in light of

² The Trial Examiner, finding that the General Counsel had failed to prove that the company lacked a good faith doubt of the union's majority status, had dismissed the refusal to bargain allegation of the complaint (172 NLRB at 2238). The Board, however, found that the company had engaged in "extensive violations" of the Act, and that this misconduct, which was "a flagrant repetition of conduct previously found unlawful" at its other stores, had "made it impossible to hold a free and fair election" (*id.* at 2232).

³ The union requested the mailing of notices to employees; either a company-wide bargaining order or a shifting of the burden of proof in future cases to require Heck's to show good faith in rejecting union cards; injunctions under Section 10(j) of the Act; greater union access to employees; compensation to employees for collective bargaining benefits lost by delay; and reimbursement of union expenses incurred to overcome the effects of the company's unlawful refusal to bargain (433 F. 2d at 543, n. 7).

the court's recent decision in *Tiidee*.⁴ In that case, the court had remanded to the Board for further consideration a union's request for similar extraordinary remedies where the company's "refusal to bargain was a clear and flagrant violation of the law" (426 F. 2d at 1248).

B. THE BOARD'S SUPPLEMENTAL DECISION

On remand, the Board amended its original order by granting some of the additional remedies requested by the union. It directed the company to mail notices of the Board's amended order to the homes of all employees at each of the company's locations; to provide the union, for a period of one year, with reasonable access to plant bulletin boards at all company locations for the posting of union notices, bulletins, and other organizational literature; and to furnish the union with a list of the names and addresses of all company employees at all store locations, to be kept current for a period of one year (App. 41A-42A).

The Board denied the further relief sought by the union, including its request that it be reimbursed for organizational costs and litigation expenses incurred by reason of Heck's unlawful conduct (App. 38A-39A). The Board was not "unmindful of the probability that the Charging Party has spent more money on organizational costs and attorney's fees than it

⁴ *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. National Labor Relations Board (Tiidee Products, Inc.)*, 426 F. 2d 1243 (C.A. D.C.), certiorari denied, 400 U.S. 950.

would have spent had the Respondent not refused to bargain" (App. 38A). It concluded, however, that it would not "effectuate the policies of the Act to require reimbursement with respect to such costs in the circumstances here" (*ibid.*). The Board explained that the appropriateness of these reimbursement requests must be considered in the light of "the role of a charging party under the statutory scheme," and the basic principles that "Board orders must be remedial not punitive"⁵ and that "collateral losses are not considered in framing a reimbursement order"⁶ (App. 38A-39A).

The Board had concluded with respect to another of the union's requests that, "[a]lthough the Respondent's unfair labor practices have been widespread, aggravated, and pervasive, they have not in our opinion been so widespread, pervasive, or aggravated as to warrant such extraordinary relief as a companywide bargaining order not based on proof of majority" (App. 34A). It reached a similar conclusion with respect to the extraordinary relief of reimbursement (App. 39A):

[T]he statutory scheme involves an interblending of public and private interests, and the participation of a charging party in the proceedings, before the Board and in the courts, can serve a public as well as its own private interests. Nonetheless, it is the Board which has been given primary initial responsibility to de-

⁵ Citing *Republic Steel Corp. v. National Labor Relations Board*, 311 U.S. 7, 11-12.

⁶ Citing *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 364.

termine and protect the public interest in the elimination of obstructions to commerce resulting from labor disputes. Such protection of the public interest as may result from the charging party's participation in litigation must be regarded, we believe, as incidental to its efforts to protect its own private interests. Given this statutory framework, we conclude that the public interest in allowing the Charging Party to recover the costs of its participation in *this litigation* does not override the general and well-established principle that litigation expenses are ordinarily not recoverable. [Emphasis added.]

C. THE SUPPLEMENTAL DECISION OF THE COURT OF APPEALS

The court of appeals enforced the Board's amended order and agreed in part with the Board's rejection of the union's other requests for extraordinary relief. It concluded, however, that reimbursement of organizational costs and litigation expenses would be appropriate in the circumstances of this case. Rather than remanding the case for further consideration of those remedies in light of its opinion, the court enlarged the Board's order to include such reimbursement and remanded solely for a compliance-stage determination of the amounts involved (App. 17A, 21A).

The court rested its decision with respect to reimbursement on its reading of the Board's supplemental decision in *Tüdee*, 194 NLRB 1234, which was issued subsequent to the Board's supplemental decision in this case. As the court viewed it, the Board in *Tüdee* retreated from its rationale in this case by

ordering reimbursement of a union's litigation expenses by an employer who interposed patently frivolous defenses to an unfair labor practices complaint. Although the Board had never suggested that Heck's defenses in this case were insubstantial, the court reasoned that "the considerations which motivated the Board to give this enlarged relief in *Tiidee* are also operative here" (App. 9A-10A).

It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board. We hold that the case before us is an appropriate one for according such relief. [App. 10A.]

Similarly, the court thought that *Tiidee* signaled a shift in the Board's position with respect to reimbursement of excess organizational costs (App. 11A). The court attached controlling significance to the fact that the Board in *Tiidee*, while refusing to order such reimbursement, found it sufficient to observe that there was "no nexus between Respondent's unlawful conduct * * * and the Union's preelection organizational expenses" (194 NLRB at 1236). The court reasoned that, since the Board acknowledged the probability of such a nexus in the present case, "we think that provision for such costs should have been included in the remedies fashioned by the Board on remand" (App. 11A).

REASONS FOR GRANTING THE WRIT

This case presents an important issue of administrative law which this Court has not previously addressed—the permissible scope of a court's authority to review an agency's remedial order which is attacked as inadequate to remedy the violation. If, as we submit, the same standards apply regardless of whether the order is challenged as going too far or not far enough, then the court below has departed from its permissible role by substituting its judgment for that of the Board concerning the appropriateness in this case of an order requiring reimbursement for organizational and litigation expenses. The principles underlying the decision below could seriously impair the effective administration of the labor laws by restricting the Board's authority to fashion appropriate relief in accordance with its informed judgment.

1. In the usual case in which the remedy of an administrative agency is challenged, the claim is that the agency has gone too far, either because it has no authority to take the action or because on the particular facts the action was unnecessary and inappropriate and thus constituted an abuse of discretion. In a wide variety of situations, this Court has recognized that agencies have broad discretion to devise appropriate remedies, and that their orders are subject to judicial modification only "where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 613. See, also, *Butz v. Glover Livestock Commission Co.*, No.

71-1545, decided March 28, 1973, slip op., p. 4. "The court may decide only whether, under the pertinent statute and relevant facts, the [agency] made 'an allowable judgment in [its] choice of the remedy'" (*Butz, supra*, slip op. at p. 7, quoting from *Siegel, supra*, 327 U.S. at 612).

The present case is the converse situation. Here the claim is that the agency's remedy was improper because it did not go far enough. This Court has not previously considered the proper scope of judicial review when agency action is challenged in that context. There is no reason, however, why the principles developed in cases in which agency orders have been challenged as excessive should not also apply when they are attacked as inadequate. In either situation the controlling consideration is that Congress has left it to the agency's discretion to determine what relief is necessary to cure the violations found, and that discretion necessarily comprehends deciding not only what is necessary but also what is unnecessary. It is a "fundamental principle * * * that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power Co. v. Securities and Exchange Commission*, 329 U.S. 90, 112; *Butz v. Glover Livestock Commission Co., supra*, slip op. at p. 7; *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 194. Drawing the outer limits of the remedy implicates no less important policy considerations than determining what minimum affirmative steps must be taken.

2. Section 10(c) of the Act "charges the Board with the task of devising remedies to effectuate the policies of the Act." *National Labor Relations Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. This Court has stated that, "[i]n fashioning its remedies under the broad provisions of § 10(c) * * *, the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575, 612, n. 32. See, also, *Fibreboard Paper Products Corp. v. National Labor Relations Board*, 379 U.S. 203, 216. The Board's remedy thus may not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U.S. 533, 540.

Unless different standards apply where the Board's remedy is challenged as inadequate, the court below plainly exceeded its authority by enlarging the remedies chosen by the Board in this case. The court did not—and on this record could not—find that the order was "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act" (*Virginia Electric & Power Co.*, *supra*), or that it had "no reasonable relation to the unlawful practices found to exist" (*Jacob Siegel Co.*, *supra*), or that it was a "patent abuse of discretion" (*Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411, 414). To the contrary, the Board's remedies were carefully fashioned to fit the special facts of this case

and to further the policies of the Act. Indeed, those remedies—requiring Heck's to mail notices to its employees' homes, to provide access to company bulletin boards at all its stores, and to furnish a current list of all its employees—went well beyond the remedies normally provided for the kinds of unfair labor practices committed in this case.

The Board's refusal to order reimbursement of litigation and organizational expenses was "an allowable judgment" (*Jacob Siegel Co.*, *supra*, 327 U.S. at 612) that should not have been overturned. It was a proper exercise of the Board's wide remedial discretion to determine that the violations in this case were not so aggravated and their effects not so broad as to require reimbursement of these expenses to the union. The court, by rejecting that judgment, has departed from the proper standards. "For reviewing courts to substitute * * * their [own] discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.' " *National Labor Relations Board v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 444.

3. The court was in error in concluding that the Board's decision in *Tiidee* undercut its rationale for denying reimbursement in this case. The Board found in *Tiidee*, and did not find here, that the employer's defenses to the unfair labor practice charges were frivolous. It ordered reimbursement of the union's

litigation expenses "in order to discourage future frivolous litigation" (194 NLRB at 1236). "The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available" (*ibid.*).

In a case like this one, however, where the employer, though charged with serious misconduct, tenders a plausible and substantial defense,⁷ the public interest in "uncrowded Board and court dockets" collides with the right of a respondent to obtain an adjudication of the issues he presents. In those circumstances, it is not unreasonable for the Board to adhere to the traditional American rule that "attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717. See, also, *Hall v. Cole*, No. 72-630, decided May 21, 1973, slip op., p. 3.⁸

Similarly, *Tiidee* represents no change of policy with respect to excess organizational expenses. The refusal of the request for such relief in *Tiidee*—based on the

⁷ As the Board noted (App. 37A), Heck's "introduced testimony which if fully credited and given its broadest possible sweep, would have resulted in the rejection of sufficient cards to have vitiated the Union's majority claim." Moreover, the Trial Examiner found other grounds for sustaining the company's defense to the refusal to bargain allegation of the complaint (*supra*, p. 4, n. 2).

⁸ Indeed, the court of appeals itself recognized the propriety of drawing such a distinction between frivolous and non-frivolous litigation. It upheld on this basis the Board's refusal to order Heck's to reimburse the union's members for benefits lost as a consequence of Heck's refusal to bargain (App. 14A-17A).

Board's finding that there were no excess costs attributable to the employer's unlawful conduct—is wholly consistent with the Board's determination here that, despite the probability that there were some excess organizational costs, the Act's policy would not be furthered by ordering reimbursement on the facts in this record. The only difference between the cases is that in *Tiidee* the Board found it unnecessary to consider the appropriateness of the remedy on the facts there, because it was clear that no excess costs were incurred.

Even if there were an inconsistency between the decisions, however, the court below should not have resolved it without first obtaining the views of the Board. And if it considered that the Board had not adequately explained its reasons for denying reimbursement in this case, the appropriate course would have been to remand the case again to give the Board an opportunity to state those reasons.* See *Metropolitan Life Ins. Co., supra*.

4. The decision below, if it is permitted to stand, is likely to have a substantial impact on the Board's capacity effectively to administer the Act. Since any person aggrieved by a Board order "denying in whole or in part the relief sought" may obtain review in the

* The Board might have explained in more detail, for example, that the other relief ordered would adequately remedy the effects of the company's misconduct; or that the existence and amount of any excess organizational expenses would be impossible to determine, because such a determination would require speculation as to what would have happened had there been no unlawful activity (*e.g.*, possibly more vigorous lawful activity); or that to award relief so speculative in nature might invite collateral litigation that would burden the Board's docket.

District of Columbia Circuit (Section 10(f) of the Act, 29 U.S.C. 160(f)), the inevitable consequence of this decision will be a substantial number of cases in that circuit challenging the Board's refusal to grant extraordinary relief. Given that court's apparent disposition to sustain such challenges, as evidenced by its decisions in this case and in *Tiidee*, review by this Court is necessary to preserve the Board's statutory discretion with respect to fashioning remedial orders.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
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AUGUST 1973.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1550

**FOOD STORE EMPLOYEES UNION, LOCAL NO. 347
AMALGAMATED MEAT CUTTERS**

AND

**BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO.
PETITIONER**

v.

**NATIONAL LABOR RELATIONS BOARD,
RESPONDENT**

**Petition for Review of Order of National Labor
Relations Board**

Decided March 21, 1973

Before BAZELON, *Chief Judge*, and McGOWAN and LEVENTHAL, *Circuit Judges*.

Opinion for the Court filed by McGOWAN, *Circuit Judge*.

McGOWAN, *Circuit Judge*: In this direct review proceeding under the National Labor Relations Act, we are concerned only with remedies. The wrongs—consisting of Section 8 (a)(1) and (5) violations—were before us in *Food Stores Employees Union, Local 347 v. NLRB*, 433 F.2d 541 (1970). We there granted enforcement of the Board's order, but, in response to the Union's contention that the Board should have gone further in providing adequate relief, we remanded the case to the Board for reconsideration of the Union's requests in this regard. Although the Board has increased somewhat the range of the relief granted by it initially, the Union has renewed its complaint to this court that the Board has fallen short of proper effectuation of the policies of the Act. To the limited extent hereinafter indicated, we find this to be true; and we enlarge the remedies accordingly.

I

The employing company, Heck's Incorporated, is not a stranger to the processes of the Board. Operating a chain of discount stores in the Southeast, this is the eleventh time that its resistance of union organization has embroiled it in Board proceedings.¹ In none has it prevailed

¹ The long history of this struggle is as follows: Heck's Discount Store, 150 NLRB 1565 (1965), *enforced per curiam*, 369 F.2d 370 (6th Cir. 1966); Heck's Inc., 156 NLRB 760 (1966), *enforced as modified*, 386 F.2d 317 (4th Cir. 1968); Heck's Inc., 158 NLRB 121, *enforced per curiam*, 387 F.2d

at the Board level, and its fortunes in the Courts of Appeals have been only marginally better.² In its first opinion in this case, the Board characterized Heck's as having "a labor policy in all its stores that is opposed to the policies of the Act." In its Supplemental Decision following upon our remand, the Board asserts that "it is by now clear that [Heck's] conduct here is but part of a pattern of unlawful antiunion conduct engaged in by [Heck's] top officials throughout [its] entire operations for the purpose of denying to all of its employees the exercise of those rights guaranteed the employees by Section 7 of the Act;" and, viewing Heck's conduct not "in isola-

65 (4th Cir. 1967); Heck's Inc., 159 NLRB 1151 and 159 NLRB 1331 (1966), *consent decree entered* (4th Cir. No. 11,390 June 13, 1967); Heck's Inc., 166 NLRB 186 and 166 NLRB 674 (1967), *enforced as modified*, 390 F.2d 655 (4th Cir. 1968) and 398 F.2d 337 (4th Cir. 1968), *modified and remanded sub. nom.* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); Heck's Inc., 170 NLRB 178 (1968), *enforced in part, remanded in part in light of* NLRB v. Gissel Packing Co., *supra*, 418 F.2d 1177 (D.C. Cir. 1969); Heck's Inc., 171 NLRB 777 (1969); Heck's Inc., 172 NLRB No. 255 (1969), *enforced in part, remanded in part*, 433 F.2d 541 (D.C. Cir. 1970); Heck's Inc., 174 NLRB 951 (1971).

² The Fourth Circuit refused to enforce an 8(a)(5) order to bargain in NLRB v. Heck's Inc., 386 F.2d 317 (4th Cir. 1967), on the ground that the card majority had been obtained through improper participation of supervisory personnel. In N.L.R.B. v. Heck's Inc., 398 F.2d 337 (4th Cir. 1968), the court declined enforcement of an order to bargain, but that decision was reversed by the Supreme Court *sub. nom.* N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969). This court, while enforcing the Board's order in part in Food Store Emp. U., Loc. 347, Amal. Meat Cut. v. NLRB, 418 F.2d 1177 (1969), remanded, in light of *Gissel*, for further findings as to whether the employer's refusal to bargain was accompanied by independent unfair labor practices which precluded a fair election.

tion" but "in the total context," the Board characterized Heck's unfair labor practices as "clearly aggravated and pervasive."

The unfair labor practices involved in this case grew out of the Union's effort to organize the employees of Heck's store in Clarksburg, West Virginia. The 8(a)(1) violation was found by the Board to reside in unlawful questioning and threatening of employees, and management polling by nonsecret ballot to ascertain the degree of employee support for the Union. The 8(a)(5) dereliction consisted of a refusal to bargain despite the existence of cards showing a majority in favor of the Union. The remedies initially afforded by the Board included a bargaining order, and the conventional command that the employer cease and desist from interfering with Section 7 rights. Appropriate notices of the relief given were directed to be posted at all of Heck's stores.

The Union's requests for additional relief at issue on the remand were as follows:

1. A copy of the notices ordered to be posted should also be sent to the home of each Heck's employee, and the president and vice-president of Heck's should be required to read the notices to employees at all Heck's locations.

2. To facilitate Union access to employees, Heck's should (a) provide the union with a list of names and addresses of all its employees; (b) afford the Union access to company bulletin boards and other posting places; (c) permit Union use of employer facilities in non-working parts of the stores during non-working hours; and (d) permit the Union to call a meeting in each store on company time in facilities customarily used for employee meetings.

3. Heck's should be ordered to bargain with the Union on a company-wide basis, i.e., the Board should recognize a bargaining unit encompassing all the stores in the Heck's chain.

4. The General Counsel should be ordered to seek

injunctions under § 10(j) of the Act whenever a complaint issues against Heck's.²

5. Heck's should be ordered to reimburse employees for the loss of wages and fringe benefits that would have obtained if it had not flagrantly violated § 8(a) (5) by refusing to bargain about a contract.

6. Heck's should be ordered (a) to pay the Union the amount of dues and fees which would have been paid by the employees of the Clarksburg store during the period of Heck's refusal to bargain; and (b) to compensate the Union for its litigation expenses, including reasonable attorney's fees, and for excess organization expenses caused by the unfair labor practices to which it was subjected.

The proceedings upon remand consisted of the receipt by the Board of statements of position from the General Counsel, the Union, and Heck's. After consideration of these statements, the Board issued a Supplemental Decision and Amended Order, which enlarged the remedies in the following respects:

1. The notices required to be posted at all of Heck's stores are also required to be mailed to each employee at his home.

2. The Union is to be afforded access for a one-year period to Heck's bulletin boards, and other places

² In its Supplemental Decision, the Board at the outset noted that the Union requested this particular relief and the General Counsel opposed it; and thereafter made no further reference to the matter. Similarly, there was no discussion of this item by either the Union or the Board in their briefs and arguments before us. In these circumstances we do not pursue the matter, except to remark that the General Counsel's statement on remand emphasizes his continuing sensitivity to the obligations imposed upon him by Section 10(j). He also pointed out that the final order to be entered by the Board in this case runs against Heck's, and cannot operate to impose obligations on the General Counsel. It may be that the matter was not pressed upon the Board in the light of these representations.

where notices to employees are customarily posted, for the posting of Union notices, bulletins, and other organizational literature.

3. The Union is to be furnished by Heck's with a list of all of its employees' names and addresses, such list to be kept current for a one-year period.

Dissatisfied with the degree to which the Board thus moved in the direction of meeting its requests, the Union petitioned for review in this court. The Board has responded in defense of its actions, but Heck's, although its position on remand was that no additional relief was in order, has not intervened and is not now before us.

II

We turn first to the controversies that remain with respect to non-monetary relief. All of the additional relief given on remand was of that character, and it is now unchallenged. The Union does not appear to press its contention that the notices—now required to be mailed as well as posted—also be read by the company officers; and we do not, in any event, disturb this exercise of the Board's discretion. The union does complain of the failure to give it access to the employees on company property. The Board was of the view that this privilege was not demonstrably necessary to the effectiveness of the Union's organizing efforts, especially in the train of the Board's action in requiring that the Union be furnished with the list of employees' names and addresses. Until this latter expedient had been tried and found wanting, the Board thought that the problems inevitably attendant upon Union activity on company property need not be anticipated. This is an exercise of judgment which we are not disposed to overturn.

The Union also persists in its assertion that the bargaining order, which presently embraces only the unit

at the Clarksburg location, should be made company-wide. The Board, emphasizing that the Union's organizing campaign has been, as in the case of Clarksburg, conducted on a store-by-store basis, and that there is no claim that the Union represents a majority of all the employees or a majority in any location other than those presently covered by bargaining orders,⁴ alludes to the novelty of this kind of relief, especially in the light of Section 7's explicit guarantee of the right of employees to refrain from representational bargaining.

Despite the unrelieved history of the omission of this device from the Board's remedial arsenal, the Board has purported to consider the proposal on its merits. Its conclusion was that the Union's very success in gaining majorities in a number of single locations indicates that its potential for successful organization elsewhere is substantial—a potential which, indeed, has been presumably increased by the enlarged relief currently being given. Under these circumstances, the Board thought it both unnecessary and unwise to risk trenching upon the policies of Section 7 in the absence of proof that the Union would be helpless without this extraordinary relief. These con-

⁴ Neither do we disturb the Board's rejection of a related Union proposal, which was supported by the General Counsel, that the Board enter *now* a bargaining order with respect to any single-store unit as to which the Union *hereafter* secures a card majority or otherwise achieves bargaining rights. The Board, in addition to believing that this was not essential to the employees' ability in the future freely to choose their bargaining representatives, pointed out that disputes over representation issues would, under this approach, presumably have to be decided by the courts of appeals acting with the aid of special masters—a circumstance that promises neither greater expedition in handling nor more expert resolution in result. We have no warrant to fault the Board for taking these considerations into decisive account.

considerations seem to us rational in nature and well within the range of respect traditionally to be accorded by us to the Board's determinations.³

III

The remaining components of the Union's prayer for additional relief involve monetary compensation. They are four in number.

1. *Legal Fees and Litigation Expenses.*

It is the Union's submission that, where it is necessary to exhaust legal procedures in order to attain rights accorded it by the Act, it should be reimbursed for its counsel fees and other litigation expenses, at least in respect of an employer who, like Heck's, has been found by the Board to have engaged in a deliberate "pattern of unlawful antiunion conduct." The Board, however, stressed the fact that the Act assigns the laboring oar to the General Counsel in the prosecution of an unfair labor practice charge, and that the participation of the charging party is not central to the public purposes of the statute but, rather, incidental to that party's efforts to assure protection of its own private interests. With this statutory framework, said the Board, "the public interest in allowing the Charging Party to recover the costs of its participation in this litigation does not override the general and well-established principle that litigation expenses are ordinarily not recoverable."

³N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 612 n. 32 (1969); Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 216 (1964); International Union of Electrical Workers v. N.L.R.B., 426 F.2d 1243, 1250 (D.C. Cir. 1970), cert. denied, 400 U.S. 950.

There are, it seems to us, obvious difficulties with this approach, certainly in the case of an employer who appears to look upon litigation as a convenient means of delaying—and thereby perhaps avoiding—the fatal day of union recognition and collective bargaining. We need not pursue those difficulties in detail, however, for the reason that the Board itself has subsequently departed from the rationale upon which its refusal of litigation expenses in this case is based. In its Supplemental Decision and Order, 194 NLRB No. 198, issued after remand by this court in *International Union of Electrical, Radio & Machine Workers, AFL-CIO v. NLRB* (Tiidee Products, Inc.), 426 F.2d 1243 (1970), cert. denied, 400 U.S. 950 (1970), the Board ordered the additional relief of payment to both the labor organization and the Board of their litigation expenses in both the Board and court proceedings.

In doing so the Board reasoned that the Congressional objective of achieving industrial peace through collective bargaining “can only be effectuated when speedy access to uncrowded Board and court dockets is available.” It went on to conclude that, “in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper” to order reimbursement of both the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of the cases before it and in this court.*

We think the considerations which motivated the Board to give this enlarged relief in *Tiidee* are also operative

* These reimbursable expenses were described by the Board as “reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses.”

here. Although the Board in its Supplemental Decision in this case has nowhere characterized the litigation as frivolous, it has used the language of "clearly aggravated and pervasive" misconduct; and in its original opinion it questioned Heck's good faith because of its "flagrant repetition of conduct previously found unlawful" at other Heck's stores. It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board. We hold that the case before us is an appropriate one for accordng such relief.

2. *Organizing Costs.*

In its Supplemental Decision after remand, the Board lumped litigation expenses and excess organizational costs together in its discussion. It prefaced that discussion by saying that "... we are not unmindful of the probability that the Charging Party has spent more money on organizational costs and attorneys' fees than it would have spent had [Heck's] not refused to bargain."⁷ It concluded, however, not to make any allowances in this regard for the reasons articulated by it in denying litigation expenses. This rationale, as we have seen, generally turned upon what the Board considered to be the subordinate role of a charging party in the scheme of the Act.

⁷ In his statement of position on remand, the General Counsel supported the Union's entitlement to extraordinary organizational costs. His comment was that where the Union was required by Heck's unfair labor practices "to expend additional funds in organizational activity over and above those normally required . . . [Heck's] should be ordered to reimburse the Union for these additional expenditures."

As in the case of litigation expenses, the Board, upon remand in *Tiidee*, has shifted its ground with respect to organizational costs. In its Supplemental Decision in *Tiidee*, the Board did not allow the claim for excess organizational expenses, but it justified that action solely on the ground that "... the Union was selected by the employees after a 2-month campaign at the first election held;" and, because of this circumstance, the Board found "... no nexus between Respondent's unlawful conduct here under examination and the Union's preelection organizational expenses . . ." Thus, in *Tiidee* the Board appears to have denied organizational costs because it believed that, on the facts of that case, no unusual organizational costs had been incurred.

This obviously is quite a different thing from saying that the policies of the Act forbid the allowance of such costs in cases like the one before us, where the Board has in terms indicated its awareness of "the probability" that such costs were experienced by reason of Heck's intransigence. Under these circumstances we find nothing in the Board's Supplemental Decision which constitutes an adequate justification for the denial of extraordinary organizational costs to which the Union was exposed by reason of Heck's policy of resisting organizational efforts and refusing to bargain; and we think that provision for such costs should have been included in the remedies fashioned by the Board on remand.⁸

⁸ Counsel for the Board in their brief in this court attempt to supply a number of reasons why excess organizational costs should not be taken into account, such as their assertedly speculative nature and their invitation of collateral litigation which burdens the Board's administration of the Act. These are counsel's reasons, not the Board's; and, under familiar principles of judicial review of administrative agencies, we appraise the Board's actions only in terms of the latter.

3. *Union Dues and Fees.*

In its Supplemental Decision dealing with the Union's claim that it should be reimbursed for union dues and fees lost by it during the period when Heck's was refusing to bargain, the Board asserts that the only predicate for such relief would be a finding by it that, had there been bargaining, it would have resulted in the inclusion of a union security clause which would have required payment of dues and fees as a condition of continued employment. The Board concludes that "[W]hile the execution of such an agreement is of course a possibility, we cannot conclude that it is so strong a probability that any loss of dues or fees must be deemed to have resulted from [Heck's] unlawful refusal to bargain."⁹

The Union, in challenging this conclusion, argues alternatively that (1) the likelihood of the successful negotiation of a union security clause is substantial in the light of the prevalence of such clauses in collective bargaining agreements, or (2) even if it be assumed that no such contract would have ensued, the willingness of Heck's to bargain at all would have resulted in the voluntary payment of union fees and dues by at least some of the 26 employees who signed the authorization cards.

We have difficulty with each of these hypotheses. It is undoubtedly true that union security clauses have attained a wide degree of use, but it also remains true that an employer may bargain to impasse with respect to such a

⁹ The Board raised, although it pretermitted, a question as to its power to provide a remedy in respect of union dues and fees, because of the restrictions on payments by employers to employee representatives imposed by Section 302 of the Act. Because of the disposition we make of this claim we need not pursue this issue of authority, although it would appear that Section 302 is addressed to other circumstances than those involved here.

demand, and that the Board may not impose that obligation upon the employer. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). We also think it speculative in the extreme to suppose that employees would voluntarily begin paying initiation fees and dues to a union which has been denied recognition and failed to produce a contract. There is nothing in the record to show—and the Union does not represent to us—that it made any effort to assess dues and fees during the period of its travail with Heck's. In the absence of such evidence, there is some reason to suppose that union policy, generally and in the case of the Union here involved, is not to make any effort to collect dues and fees, at least in the case of newly organized employees, until the fruits of union membership are brought home in the form of a signed agreement.¹⁰

It would, in any event, present formidable problems of proof to try to determine at this late date which employees would, if they had been asked, have paid fees and dues during the period in question. Short of assuming that all would have done so—an assumption for which there seems little foundation in the realities of human nature—

¹⁰ In its rejection of a claim of this kind on remand in *Tiidee*, the Board noted that the labor organization involved in that case had asserted that "... because it is union policy not to collect initiation fees and dues until a contract is executed, it has received nothing from the unit employees throughout the course of this proceeding..." The Board purported first to view this claim as "partaking of a request for a make-whole remedy, which we have declined to order, since presumably the dues and fees sought would have come from lost wages..." Although it may be that the Board here is confusing the substantive merits of a make-whole remedy with the wholly manageable problem of preventing a double recovery, the Board went on to conclude that, since the union as a matter of policy did not seek initiation fees and dues prior to negotiation of a contract, it saw no reason to cause the employer to assume the risk of that passivity.

the inquiry would be an exercise in futility. In any event, the loss, if any, of such dues and fees will, we think, be offset to some extent by the relief we have directed in respect of extraordinary organizational costs.^{12a}

4. *Compensation for Lost Benefits.*

The additional remedy of making its members whole for the wage and other fringe benefits which might have accrued from the bargaining process is the matter principally pressed by the Union. In its Supplemental Decision, the Board initially reiterated its position, stated in *Ex-Cell-O Corporation*, 185 NLRB No. 20, that it was wholly lacking in statutory authority to give relief of this nature. However, it went on to conclude that, even if it had the power to act, this would not be an appropriate case in which to do so. It pointed to the opinions of this court subsequent to *Tiidee* in which we have held the make-whole remedy inapplicable where the refusals to bargain rested on "debatable" issues, as contrasted with those which we, as in *Tiidee*, have characterized as "patently frivolous."¹³ Referring to the precise circumstances

^{12a} In *Bangor & Aroostock R. Co. v. BLFE*, 442 F.2d 812 (1971), this court held that dues and fees could be recovered by a union as damages in respect of improper job abolitions. A union shop clause in the collective bargaining agreement there involved made it plain that, but for the employer's action, dues and fees would have been paid. The uncertainty claimed was whether men hired to fill the positions would have joined the plaintiff union rather than its competitor. The court there thought that the evidence supported a reasonable inference that they would, thereby justifying the placing of the burden of proof as to the uncertainty on the employer. In the case before us, union policy would have resulted in no receipt of dues and fees even during an unduly prolonged, bargaining period.

¹³ *International Union, UAW v. NLRB (Ex-Cell-O Cor-*

of this case, the Board concluded that the latter category did not embrace a defense which failed solely by reason of the credibility determinations of the Trial Examiner.

The union, although harassed from the beginning of its organizing campaign at the Clarksburg store, within a few days represented to Heck's that it had in hand the signed authorization cards of a majority of the employees; and it requested recognition and bargaining. The response of Heck's was to file a petition for an election. When the election was held some six weeks later, the Union lost by a vote of 16 to 19, although this result was subsequently nullified by reason of the employer's unfair labor practices. The Trial Examiner found that the General Counsel had failed to prove that Heck's lacked a good faith doubt of the Union's majority status and that, accordingly, there was no 8(a)(5) violation.

In making this determination, the Trial Examiner focused first on the substance of Heck's refusal to recognize the Union on the basis of the cards. The administrative hearing record shows that Heck's introduced testi-

poration) 449 F.2d 1046, 449 F.2d 1058 (1971); *Steelworkers v. NLRB* (Quality Rubber Mfg. Co.), 430 F.2d 519 (1970); *Amalgamated Clothing Workers v. NLRB* (Levi Strauss & Co.), 441 F.2d 1027 (1970).

In *Ex-Cell-O*, the union requested and won the election, but the employer refused recognition on the basis of union activity which allegedly precluded a fair election. In *Quality Rubber*, the employer refused recognition on the basis of cards, but did not seek an election. The result turned on issues of credibility which, although resolved against the employer, were found to be consistent with good faith. In *Levi Strauss & Co.*, the union requested an election after the employer refused recognition on the basis of cards. The union lost, but the employer was ordered to bargain because it was found to have engaged in unfair labor practices during the period preceding the election. Again the resolution turned on conflicting testimony.

mony by certain employees as to intimidation and other circumstances which, if it had been believed, would have eliminated enough cards to vitiate the majority status claimed by the Union. Although the Trial Examiner ultimately found each of the cards to have been validly obtained, he noted that the determination turned upon some close questions concerning the credibility of witnesses. The Trial Examiner also emphasized the fact that Heck's had promptly filed an election petition after the demand was made, and that Heck's had had some prior experience with card-based bargaining demands from the Union which later proved unwarranted.¹²

The Board took its stand principally upon what it termed to be the long history of disregard by Heck's generally of its obligations under the Act. Thus the Board's finding of bad faith was based not on a determination that Heck's objections to this particular demand for recognition were insubstantial, but rather on Heck's repetition in the period preceding the election of conduct found in prior proceedings to have been illegal. We agree with the Board's conclusion that an employer's good faith must be judged in the entire context of its behavior, and indeed our determination that some additional remedies are required in this case is based on Heck's consistent and repeated demonstration of antiunion animus. However, the factors which influenced the Trial Examiner on the issue of good faith remain undisturbed by the Board's decision and are relevant to the appropriateness of the make-whole remedy.

In the light of these circumstances, we are not inclined to say that the Board's treatment of this issue on remand is beyond the wide range of latitude traditionally accorded

¹² Heck's Inc., 159 NLRB 1151, 159 NLRB 1331, *consent decree entered* (No. 11,390, 4th Cir. June 13, 1967); N.L.R.B. v. Heck's Inc., 386 F.2d 317 (4th Cir. 1968).

the Board in the matter of remedies. The Supreme Court, although ultimately accepting the signed card approach in *Glissel* as a basis for creating the recognition and bargaining obligation, did at the same time refer to cards as "admittedly inferior to the election process." The employer here appears to have had some basis for questioning the result of the card approach, and it exhibited its readiness to invoke the election process. We do not, accordingly, revise the Board's failure to provide an additional remedy in the form of a make-whole provision.¹³

We grant enforcement of the Board's Amended Order, as the same shall be further enlarged upon remand by the inclusion of the additional remedies of litigation costs and organizational expenses discussed hereinabove.

It is so ordered.

¹³ The Board is equipped with a broad arsenal of remedies which it may employ in the case of a persistent violator. Rather than require application of such remedies on an all-or-nothing basis, it seems to us preferable to preserve sufficient flexibility to adjust the relief granted to the particular facts of each case. There are, as in everything else, degrees of flagrancy—and variations in its pattern.

APPENDIX B

[Received April 2, 1973, Hugh E. Kline, Clerk]

[Filed April 26, 1973, Hugh E. Kline, Clerk]

United States Court of Appeals for the District of
Columbia Circuit

No. 71-1530

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGA-
MATED MEAT CUTTERS AND BUTCHER WORKMEN OF
NORTH AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Judgment

Before BAZELON, Chief Judge and McGOWAN and
LEVANTHAL, Circuit Judges

THIS CAUSE came on to be heard upon a petition of Food Store Employees Union, Local 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO to review an amended order of the National Labor Relations Board dated July 1, 1971, against Heck's Inc., its officers, agents, successors and assigns. The Court heard argument of respective counsel on April 17, 1973, and has considered the briefs and transcript of record filed in this case. On March 21, 1973, the Court, being fully advised in the premises handed down its opinion granting en-

forcement of the Board's amended order as modified. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Heck's, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning their union membership, sympathies, or activities.

(b) Threatening employees that choice of a union as their collective-bargaining representative would lead to the closing of the store.

(c) Illegally polling employees in a nonsecret ballot election to ascertain which employees support Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL-CIO.

(d) Interviewing employees under coercive circumstances concerning matters relating to unfair labor practice charges and objections to an election.

(e) Refusing to bargain with Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL-CIO, as the exclusive representative of its employees in the following appropriate unit:

All employees of the Heck's, Inc. Clarksburg, West Virginia, store, excluding supervisors, guards, and professional employees.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the

above-named labor organization as the exclusive representative of all the employees of Heck's, Inc. in the unit found to be appropriate and, if an agreement is reached, embody such understanding in a signed agreement.

(b) Post at each of its retail stores copies of the attached notice marked "Appendix," and mail a copy thereof to each of its employees. Copies of said notice, on forms provided by the Regional Director for Region 6, (Pittsburgh, Pennsylvania), after being duly signed by the representative of Heck's, Inc., shall be posted and mailed immediately upon receipt thereof, and those posted shall be maintained by Heck's, Inc. for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Heck's, Inc. to insure that said notices are not altered, defaced, or covered by any other material.

(c) Upon request of the Union, made within 1 month of the date of the Board's decision of July 1, 1971, immediately grant the Union and its representatives reasonable access for a 1-year period to its bulletin boards and all places where notices to employees are customarily posted.

(d) Upon request of the Union, made within 1 month of the date of the Board's decision of July 1, 1971, make available to the Union a list of names and addresses of all employees currently employed and keep such list current for a period of 1 year thereafter.

(e) Pay to the Union any extraordinary organizational costs which the Union incurred by reason of Heck's policy of resisting organizational efforts and refusing to bargain, such costs to be determined at the compliance stage of these proceedings.

(f) Pay to the Board and the Union the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of these cases before the National Labor Relations Board and the courts, such costs to be determined at the compliance stage of these proceedings.

(g) Notify the said Regional Director, in writing, within 20 days from the date of this Judgment, what steps Heck's, Inc., has taken to comply herewith.

DAVID BAZELON,

Chief Judge, U.S. Court of Appeals for the District of Columbia Circuit.

CARL MCGOWAN,

Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit.

HAROLD LEVENTHAL,

Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit.

APPENDIX

NOTICE TO EMPLOYEES

Posted pursuant to a judgment of the United States Court of Appeals enforcing as modified an order of the National Labor Relations Board, an agency of the United States Government

After a trial in which both sides had the opportunity to present their evidence, the National Labor Rela-

tions Board has found that we violated the law and has told us to post this notice about what we are committed to do.

All our employees have the right to self-organization to form, join, or assist labor unions, and to bargain collectively through representatives of their own choosing.

WE WILL NOT threaten to close any store because our employees select a union to represent them, or question our employees concerning their union sympathies, or activities, or membership, or illegally poll employees in a nonsecret ballot, or interview employees under coercive circumstances.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL recognize Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL-CIO, as the bargaining representative of the employees in our Clarksburg, West Virginia, store. At the request of that Union we will bargain with it in good faith with respect to the terms and conditions of employment of the employees in that store, and we will embody in a signed contract any agreement reached.

WE WILL mail a copy of this notice to all our employees.

WE WILL grant the Union reasonable right to utilize our bulletin boards.

WE WILL, upon the request of the Union, immediately give to the Union a list of names and addresses

of all our employees and WE WILL keep the list current for a period of 1 year.

WE WILL reimburse the Union for any extraordinary organizational costs it incurred as a result of the unfair labor practices found by the Board.

WE WILL reimburse the Union and the National Labor Relations Board's General Counsel for their costs and expenses in connection with this proceeding.

All of our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named Union, or any other labor organization.

HECK'S INC.,
(Employer.)

Dated _____ By _____
(Representative) (Title)

A true copy:

Test: Hugh E. Kline, Clerk, United States Court of Appeals for the District of Columbia Circuit.

By: MARY WATERS,
Deputy Clerk.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1536 Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222, Telephone 412-644-2977.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Washington, D.C., 20001, May 30, 1973.

No. 71-1550—*Food Store Employees Union, etc. v.
NLRB*

MARCEL MALLET-PREVOST, Esq.
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570

DEAR MR. MALLET-PREVOST: Enclosed is a copy of the Court's order denying your petition for rehearing.

You are further informed that your suggestion for rehearing *en banc* was transmitted to the full Court, and no Judge has requested a vote thereon.

In view of the foregoing, it is not anticipated that any further action will be taken with respect to the suggestion for rehearing *en banc*.

Yours very truly,

H. Kline
HUGH E. KLINE,
Clerk.

Enc.

[Filed May 30, 1973, Hugh E. Kline, Clerk]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

No. 71-1550

September Term, 1972

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347 AMAL-
GAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF
NORTH AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Before BAZELON, Chief Judge; McGOVERN and
LEVENTHAL, Circuit Judges

Order

On consideration of respondent's petition for
rehearing, it is

ORDERED by the Court that respondent's aforesaid
petition is denied.

Per Curiam.

For the Court:

HUGH E. KLINE,
Clerk.

APPENDIX D

United States of America Before the National Labor
Relations Board

HECK'S, INC.

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORK-
MEN OF NORTH AMERICA, FOOD STORE EMPLOYEES
UNION, LOCAL NO. 347, AFL-CIO

Supplemental decision and amended order

On September 24, 1968, the Board issued its Decision and Order in this case,¹ finding that the Respondent had engaged in various unfair labor practices, including a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act. The Board ordered the Respondent to bargain with the Union, but found no merit in the Charging Party's request for additional extraordinary remedies. Thereafter, on May 4, 1970, the Court of Appeals for the District of Columbia Circuit enforced the Board's Order² against the Respondent, but remanded the case to the Board for further consideration, in light of the court's decision in *Tiidee Products*,³ of the Union's request for

¹ 172 NLRB No. 255.

² *Food Store Employees Union, Local 347 v. N.L.R.B.*, 433 F. 2d 541.

³ *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. N.L.R.B.*, 426 F. 2d 1243 (C.A.D.C.).

additional relief. The Board, having accepted the remand, issued a notice to the parties requesting statements of position. Such statements have been filed by the General Counsel, the Charging Party, and the Respondent.⁴

The Board has given full consideration to the views of the court of appeals, as expressed in its opinions in the instant case, the *Tiidee* case, and the *Ex-Cell-O* case.⁵ The Board has also considered the parties' statements of position. For reasons more fully set forth hereinafter, the Board has concluded that it would effectuate the policies of the Act to give some but not all of the additional relief requested by the Union.

The Union seeks both monetary and nonmonetary relief. The monetary relief sought encompasses compensation for employees for loss of collective-bargaining benefits, and reimbursement of the Union for loss of dues and fees, for organizational costs, and for attorney's fees. The nonmonetary relief which it seeks includes the sending of notices to the homes of all employees at all the Company's locations; reading of the notices by Company President Haddad and Vice President Darnell to employees at all locations; granting the Union access to bulletin boards and other places where notices to employees are posted; grant-

⁴ The Respondent filed a motion for oral argument and the Union filed a response in opposition to said motion. The request for oral argument is denied as, in our opinion, the record, including the parties' statements of position, adequately presents the issues and the positions of the parties.

⁵ *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. N.L.R.B.*, 449 F. 2d 1046 (C.A.D.C., March 19, 1971) 449 F. 2d 1058 (C.A.D.C., June 9, 1971).

ing union organizers access to store lounges, restaurants, and parking lots; granting the use of company facilities for a union meeting at each store on company time; giving the Union lists of the names and addresses of all the Respondent's employees; and either requiring the Respondent to bargain with the Union now in a companywide unit, or requiring the Respondent to bargain without further Board proceedings in any store unit in which the Union presents a card majority. The Union also seeks an order directing the General Counsel to seek an injunction under Section 10(j) of the Act whenever a complaint is issued against the Respondent.

The General Counsel opposes reimbursement of employees for loss of collective-bargaining benefits, the award of attorney's fees, a companywide bargaining order, and an order directing him to seek injunctions under Section 10(j) of the Act. He took no position concerning reimbursement of the Union for the loss of dues and fees and with respect to the reading of notices to employees by company officials. He generally supported the Union's other requests for additional relief, although in some cases with certain reservations and qualifications.

The Respondent contends that no additional remedial provisions are warranted.

In the instant case, the Respondent violated Section 8(a)(1) of the Act by conduct which included threats, interrogations, coercive interviews, and illegal polls. The Respondent also unlawfully refused to bargain with the Union as the representative of its employees at this location in an appropriate unit. Respondent President Haddad and Vice President Darnell person-

ally participated in some of the conduct which we and the court of appeals have found violated the Act.

Viewed in isolation, the Respondent's conduct as found in this case, although serious, is not so aggravated or pervasive as to warrant additional special remedies. However, as we have had occasion to point out, in a somewhat different context with respect to this Respondent,⁶ it is by now clear that Respondent's conduct here is but part of a pattern of unlawful antiunion conduct engaged in by Respondent's top officials throughout Respondent's entire operations for the purpose of denying to all of its employees the exercise of those rights guaranteed the employees by Section 7 of the Act. In such circumstances conduct at a single store such as this can no longer be viewed in isolation; Respondent's conduct must, rather, be viewed in its total context. As so viewed, Respondent's unfair labor practices are clearly aggravated and pervasive. It is, accordingly, against this background of companywide aggravated and pervasive unfair labor practices that we consider the Union's request for additional relief in this particular case.

1. Initially, we believe it appropriate to comment concerning the intended scope of our order with respect to the Respondent's violations of Section 8 (a) (1). In his decision, which the Board adopted with respect to his findings of violations of Section 8(a) (1) of the Act, the Trial Examiner, in the light of Respondent's violations at various other stores in its chain, Respondent's posting at all of its stores of telegrams concerning the results of elections or polls at

⁶ See *Heck's, Inc.*, 172 NLRB No. 255.

other stores, and the participation by Respondent's top officials in these unfair labor practices, concluded that the order should be broad enough to restrain future violations of Section 8(a)(1) at any and all of the Respondent's stores. Although the Board modified the Trial Examiner's findings and conclusions to the extent of finding an unlawful refusal to bargain that the Trial Examiner did not find, the Board did not in any respect disagree with the Trial Examiner's conclusions that the remedy for the 8(a)(1) violations should be companywide. Indeed, the Board specifically adopted that portion of the Trial Examiner's order which required that the notices be posted at all of Respondent's stores. It is possible, however, that the inclusion at the beginning of the Board's Order of the store location at which these specific unfair labor practices occurred may have been interpreted as a *sub silentio* rejection of the Trial Examiner's recommendation with respect to the scope of the order. It was not so intended, and except as expressly limited therein, the order hereinafter entered shall apply to all of Respondent's employees and all of its operations wherever located.

2. With respect to the nonmonetary aspects of the requested additional relief, the basic function of an order remedying violations of Section 8(a)(1) is to assure to employees who, as here, have been subjected to interference, restraint, and coercion by their Employer with respect to their right to select their own bargaining representative, that they have a protected right to engage in such activity, free from any fear of reprisal or other employer interference, restraint, or

coercion. In the ordinary case, the posting of notices for a prescribed period is generally deemed sufficient to dispel the effects of the unlawful conduct. Here, however, upon reconsideration of this question in the light of all the factors involved, we conclude that the mere posting of notices by the Respondent at its operations is insufficient to dispel the lingering effects of its widespread and pervasive unlawful conduct. We believe, rather, that in order to dispel fully the effects of such unlawful conduct, it is necessary that the employees be able to read the notices fully and carefully, at their leisure, without fear that their interest in the contents of the notices will be noted by the Respondent and used against them; in addition, employees who are absent during the posting period should also have an opportunity to read the notices and be fully informed. This can best be accomplished by requiring that copies of the posted notices be mailed to each of the employees at his home.¹ In the circumstances here, the employees, in our opinion, can be adequately informed concerning the Government's protection of their Section 7 rights by the mailing and posting of the notices; we do not believe it necessary therefore, in this context, that the notices also be read to the assembled employees.

3. In addition, the full exercise by employees of their Section 7 rights requires that they be fully informed not only concerning those rights, but also con-

¹ *J. P. Stevens & Co., Inc.*, 171 NLRB No. 163, enf. 417 F. 2d 533 (C.A. 5, 1969); *Marlene Industries Corp.*, 166 NLRB 703, enf. as modified 406 F. 2d 886 (C.A. 6, 1969); *Loray Corp.*, 184 NLRB No. 57.

cerning the advantages and disadvantages of selecting a particular labor organization, or any labor organization as their bargaining representative. The Respondent has ready day-to-day access to its employees, and has consistently used that access to minimize its employees' opportunities to make an informed decision concerning collective-bargaining representation. In order that the employees may have free and ready access to information concerning all aspects of this question, we believe it is necessary in the circumstances that the Union be given reasonable access for a 1-year period to the Respondent's bulletin boards, and other places where notices to employees are customarily posted, for the posting of union notices, bulletins, and other organization literature.* We also conclude that in order to neutralize the effect of the Respondent's face-to-face restraint and coercion, it is necessary that the employees have ready access to union organizers and other officials who can explain to them the Union's point of view with respect to organizational activities.

Suggested methods of accomplishing this latter objective include requiring the Respondent to furnish the Union with a list of the names and addresses of its employees, requiring the Respondent to make company facilities available for employees meetings with union representatives, and requiring the Respondent to permit nonemployee union organizers to have access to employees in parking lots, store lounges, and other places where the Respondent's

* *J. P. Stevens & Co., Inc., supra.*

employees spend their time when not at work. We do not believe adoption of the two latter suggestions would be warranted unless, as is not established to be the case here, alternative means of access are clearly unavailable or have been tried and found wanting.⁹ The requirement that the Respondent furnish the Union with lists of names and addresses of its employees will on the other hand facilitate contact between employees and union representatives without necessarily infringing upon the Respondent's right to control the use of its own property.¹⁰ We conclude accordingly, that giving the Union access to the Respondent's bulletin boards, as aforesaid, and requiring that it be furnished with a list of the employees' names and addresses, which list shall be kept current for a 1-year period, will insure that the employees have the opportunity to become fully informed, in an atmosphere free of interference, restraint or coercion, concerning all matters relevant to their choice of a bargaining representative.¹¹

4. We have given full and careful consideration to the Union's request for a bargaining order broader than that previously entered herein, which is applicable only to the employee unit specifically involved in this case, and which has been enforced by the court of appeals. We are not persuaded that such a bar-

⁹ *N.L.R.B. v. Babcock & Wilcox Company*, 351 U.S. 105.

¹⁰ *J. P. Stevens & Co.*, *supra*.

¹¹ We deem such access to be as necessary to dispel the effects of the Respondent's conduct in those locations where the Union is the chosen representative, as in those locations where there is no representative.

gaining order is warranted in the circumstances here presented.

Initially, we note that there is no claim that the Union represents a majority of all the Respondent's employees, or that it represents a majority in any single-location unit other than those with respect to which bargaining orders are already outstanding. Consequently, by its basic position that the Board should enter a companywide bargaining order, the Union asks the Board to do something that it has never done throughout its history: to order bargaining with a union which has at no time established its majority status in the unit in which bargaining is requested.

The fact that a specific remedy has not heretofore been applied in a particular situation during the Board's more than 35-year history is not, of course, a reason for not applying it if it is otherwise warranted; it is, however, reason to examine carefully before applying it the legal and policy considerations bearing in its applicability. Although the Respondent's unfair labor practices have been widespread, aggravated, and pervasive, they have not in our opinion been so widespread, pervasive, or aggravated as to warrant such extraordinary relief as a companywide bargaining order not based on proof of majority. Indeed, the fact that the Union has been selected by a majority of the employees in a number of single-store appropriate units, including the unit involved in this proceeding, evidences the fact that the employees have not been wholly precluded from making their free choice. In these circumstances, and in view of the

additional relief which we have granted to facilitate the ability of the employees to make a free and unfettered choice with respect to the representation question at locations where they are not now represented, we conclude that there is no warrant for a companywide bargaining order such as that requested, assuming *arguendo* the Board's power to enter such an order.¹²

For a somewhat similar reason we reject the proposal that the Respondent should now be ordered to bargain at such time in the future when, with respect to any appropriate single-store unit, it either secures a card majority or the Respondent becomes lawfully obligated to bargain with respect to such unit; for we are not now convinced that at no time in the future will the Respondent's employees be able to make a free choice with respect to their representatives. Furthermore, we do not agree with the contention of the General Counsel and the Charging Party that such a procedure as that proposed would provide speedier relief in appropriate cases because it would bypass normal Board procedures. Unless the parties were in complete agreement with respect to all matters pertaining to the representation issue, the disagreements would have to be resolved by some tribunal. In the circumstances postulated by this latter proposal, that tribunal would be the court of appeals acting upon exceptions to a

¹² But see *J. P. Stevens & Co., Inc.*, 157 NLRB 869, 877; compare *N.L.R.B. v. Gissel Packing Company, Inc.*, 395 U.S. 575, 612-614.

report of a special master. There would be no guarantee that the proceedings before the special master would be any more expeditious than normal proceedings before the Board; moreover the court of appeals or its appointed special master would thereby be deprived of the Board's administrative expertise in the consideration of such disputed matter

5. Unlike most of the requests for nonmonetary relief, considered above, which presented questions of judgment as to the type of remedy that is appropriate in particular circumstances, the requests for monetary relief also require, at least in part, consideration of the Board's power to act. This is particularly true with respect to the request that the employees be made whole for loss of collective-bargaining benefits. We have in this connection fully considered the views of the court of appeals concerning the Board's power in this area, as expressed in its decisions in the *Tiidee* and *Ex-Cell-O* cases.¹³ With all due respect to these views of the court, we remain convinced, as we stated in our decision in *Ex-Cell-O*,¹⁴ that the Board lacks statutory authority to grant such relief. We will therefore adhere to our position in this matter unless and until the Supreme Court decides otherwise.

Moreover, assuming *arguendo* that we possess the necessary authority, we would nevertheless conclude that this is not an appropriate case in which to exercise such authority. In cases decided subsequent to its

¹³ See footnotes 3 and 5, *supra*.

¹⁴ *Ex-Cell-O Corporation*, 185 NLRB No. 20. For the reasons stated in the dissenting opinion in *Ex-Cell-O*, Member Brown disagrees with this conclusion, and he would grant the *Ex-Cell-O* remedy in this case.

decision in *Tiidee*,¹⁵ the court has held that *Tiidee* was inapplicable where the refusals to bargain rested on "debatable" issues, in contrast to the issues in *Tiidee*, which the court characterized as "patently frivolous." Here, as the Trial Examiner pointed out, in discussing the Respondent's contentions that the Union did not possess a majority in the appropriate unit, the Respondent introduced testimony which if fully credited and given its broadest possible sweep, would have resulted in the rejection of sufficient cards to have vitiated the Union's majority claim. Based on his resolutions of the credibility of the witnesses, the Trial Examiner found that the Respondent's contentions were without merit. With this finding we fully agree. As we understand the purport of the court's decisions in *Quality Rubber* and *Levi Strauss*, *supra*, as explicated and applied in its decisions in *Ex-Cell-O*, *supra*, it is not the court's view that because a defense is found to be without merit, it must necessarily be found to be "frivolous." As we understand the court's use of "frivolous" in this context, it refers to contentions which are clearly meritless on their face; the court did not, as we view its decisions, intend to label as "frivolous" a defense, the merit of which in the last analysis rests, as here and in *Quality Rubber* and *Levi Strauss*, upon a Trial Examiner's resolutions of credibility.

¹⁵ *Steelworkers v. N.L.R.B. (Quality Rubber Mfg. Co.)*, 430 F. 2d 519 (C.A.D.C.); *Amalgamated Clothing Workers (Levi Strauss & Co.) v. N.L.R.B.*, 441 F. 2d 1027 (C.A.D.C., December 15, 1970); see also the court's June 9, 1971, decision in *Ex-Cell-O*, fn. 5, *supra*.

6. The request for reimbursement with respect to lost dues and fees also raises statutory questions relating to the applicability of section 302, which deals with restrictions on payments by employers to employee representatives. We do not, however, deem it necessary to resolve that statutory question for in our opinion there has been no predicate laid for a conclusion that the Union in fact has lost any dues or fees for reasons attributable to the Respondent's conduct. To make such a finding requires in our opinion a further finding that had the Respondent not refused to bargain, it would have entered into a union-security agreement with the Union which would have required payment of dues and fees to the Union as a condition of continued employment. While the execution of such an agreement is of course a possibility, we cannot conclude that it is so strong a probability that any loss of dues or fees must be deemed to have resulted from the Respondent's unlawful refusal to bargain.

7. Finally, there is the Union's request for reimbursement with respect to organizational costs and attorney's fees. In considering these questions we are not unmindful of the probability that the Charging Party has spent more money on organizational costs and attorney's fees than it would have spent had the Respondent not refused to bargain. It does not necessarily follow however, that the Union is entitled to reimbursement for such additional costs. In our opinion it would not on balance effectuate the policies of the Act to require reimbursement with respect to such costs in the circumstances here.

To determine the appropriateness of these reimbursement requests, we must, we believe, consider the

role of a charging party under the statutory scheme in the light of the basic principles, that Board orders must be remedial not punitive,¹⁶ and collateral losses are not considered in framing a reimbursement order.¹⁷ As the Supreme Court has stated,¹⁸ the statutory scheme involves an interblending of public and private interests, and the participation of a charging party in the proceedings, before the Board and in the courts, can serve a public as well as its own private interests. Nonetheless, it is the Board which has been given primary initial responsibility to determine and protect the public interest in the elimination of obstructions to commerce resulting from labor disputes. Such protection of the public interest as may result from the charging party's participation in litigation must be regarded, we believe, as incidental to its efforts to protect its own private interests. Given this statutory framework, we conclude that the public interest in allowing the Charging Party to recover the costs of its participation in this litigation does not override the general and well-established principle that litigation expenses are ordinarily not recoverable.¹⁹

As we have concluded that it would effectuate the

¹⁶ *Republic Steel Corporation v. N.L.R.B.*, 311 U.S. 7, 11-12.

¹⁷ *Gullett Gin Company, Inc. v. N.L.R.B.*, 340 U.S. 361, 364.

¹⁸ *Intl. Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 283 v. Scofield*, 382 U.S. 205, 217, *et seq.*

¹⁹ *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714-717. Compare *Newman v. Piggie Park Enterprises*, 390 U.S. 400, where litigation expenses were awarded under a statute (42 U.S.C. 2000a *et seq.*) which places greater reliance on private action for the vindication of public rights.

policies of the Act to require the Respondent to take certain action in addition to the action previously ordered, we shall issue the following amended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Heck's, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning their union membership, sympathies, or activities.

(b) Threatening employees that choice of a union as their collective-bargaining representative would lead to the closing of the store.

(c) Illegally polling employees in a nonsecret ballot election to ascertain which employees support the Union.

(d) Interviewing employees under coercive circumstances concerning matters relating to unfair labor practice charges and objections to an election.

(e) Refusing to bargain with Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL-CIO, as the exclusive representative of its employees in the following appropriate unit:

All employees of the Respondent's Clarksburg, West Virginia, store, excluding supervisors, guards, and professional employees.

(f) In any other manner interfering with, restrain-

ing, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of all the Respondent's employees in the unit found to be appropriate and, if an agreement is reached, embody such understanding in a signed agreement.

(b) Post at each of its retail stores copies of the attached notice marked "Appendix,"²⁰ and mail a copy thereof to each of its employees. Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by the Respondent's representative, shall be posted and mailed immediately upon receipt thereof, and those posted shall be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to

²⁰ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

insure that said notices are not altered, defaced, or covered by any other material.

(c) Upon request of the Union, made within 1 month of the date of this Decision, immediately grant the Union and its representatives reasonable access for a 1-year period to its bulletin boards and all places where notices to employees are customarily posted.

(d) Upon request of the Union, made within 1 month of the date of this Decision, make available to the Union a list of names and addresses of all employees currently employed and keep such list current for a period of 1 year thereafter.

(e) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C.

[SEAL]

NATIONAL LABOR RELATIONS BOARD,
EDWARD B. MILLER,

Chairman.

JOHN H. FANNING,

Member.

GERALD A. BROWN,

Member.

HOWARD JENKINS, Jr.,

Member.

RALPH E. KENNEDY,

Member.

APPENDIX

NOTICE TO EMPLOYEES

*Posted by order of the National Labor Relations Board
an Agency of the United States Government*

After a trial in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has told us to post this notice about what we are committed to do.

All our employees have the right to self-organization to form, join, or assist labor unions, and to bargain collectively through representatives of their own choosing.

WE WILL NOT threaten to close any store because our employees select a union to represent them, or question our employees concerning their union sympathies, or activities, or membership, or illegally poll employees in a nonsecret ballot, or interview employees under coercive circumstances.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL recognize Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL-CIO, as the bargaining representative of the employees in our Clarksburg, West Virginia, store. At the request of that Union we will bargain with it in good faith with respect to the terms and conditions of employment of the employees in that store, and we will embody in a signed contract any agreement reached.

WE WILL mail a copy of this notice to all our employees.

WE WILL grant the Union reasonable right to utilize our bulletin boards.

WE WILL, upon the request of the Union, immediately give to the Union a list of names and addresses of all our employees and WE WILL keep the list current for a period of 1 year.

All of our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named Union, or any other labor organization.

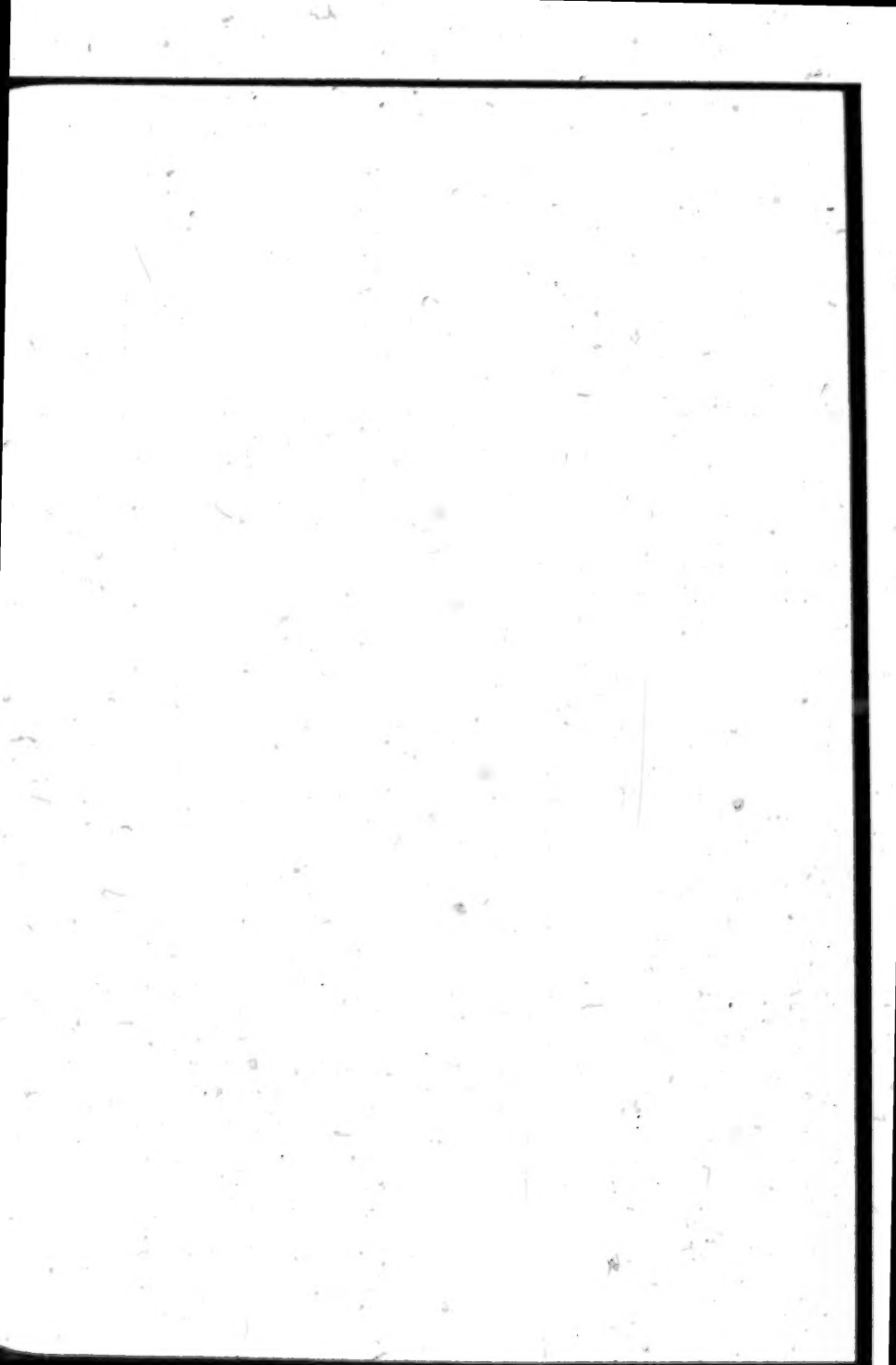
HECK'S, INC.,
(Employer.)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1536 Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222, Telephone 412-644-2977.



21

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SUPREME COURT, U. S.

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JCT 29 1973

MICHAEL ROBAY, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-370

No. 73-559

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

FOOD STORE EMPLOYEES UNION, LOCAL 347,
AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN
OF NORTH AMERICA, AFL-CIO, *Respondent.*

HECK'S INC., *Petitioner,*

v.

FOOD STORE EMPLOYEES UNION, LOCAL 347,
AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN
OF NORTH AMERICA, AFL-CIO, *Respondent.*

On Petitions for Writs of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-370

No. 73-559

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

FOOD STORE EMPLOYEES UNION, LOCAL 347,
AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN
OF NORTH AMERICA, AFL-CIO, *Respondent*.

HECK'S INC., *Petitioner*,

v.

FOOD STORE EMPLOYEES UNION, LOCAL 347,
AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN
OF NORTH AMERICA, AFL-CIO, *Respondent*.

On Petitions for Writs of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION¹

¹ Respondent herewith files a consolidated brief in opposition to the petitions filed by the National Labor Relations Board and Heck's, Inc., which petitions arise out of and pertain to the same case below.

OPINIONS BELOW

The opinion of the court of appeals (Bd. App. 1A-17A)² is reported at 476 F.2d 546.

The order of the court of appeals denying the Board's petition for rehearing appears at Bd. App. 25A. The supplemental decision and order of the Board (Bd. App. 26A-44A) is reported at 191 NLRB No. 146. The earlier decisions of the court of appeals and of the Board are reported at 433 F.2d 541 and 172 NLRB 2231, respectively. The Board's initial decision is reprinted in the Appendix to this Opposition, *infra*, pp. 1a-7a.

JURISDICTION

The jurisdictional requisites of the Board's petition are adequately set forth in its petition. Jurisdiction of Heck's petition is lacking because denial of Heck's inexcusably belated motion for intervention was well within the discretion of the court below. Accordingly, Heck's is not a "party" within 28 U.S.C. § 1254(1).³

QUESTIONS PRESENTED

In No. 73-370, the question is whether the court of appeals exceeded its authority in reversing as arbitrary, and therefore unwarranted in law, the Board's refusal to order certain remedies in this case.

In No. 73-559, the question is whether a victorious party before the Board who, without any asserted jus-

² "Bd. App." refers to the Appendices to the Board's petition.

³ The question of jurisdiction is identical to the question whether Heck's had a right to intervene. See, *Auto Workers v. Scofield*, 382 U.S. 205, 209; cf. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 688; *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 142-143.

tification, deliberately refrains from moving to intervene as a party in a review proceeding which affects its interest, has an unconditional right to intervene after the court of appeals has rendered its decision.

STATUTE AND RULE INVOLVED

Section 10 of the National Labor Relations Act, 61 Stat. 146, 73 Stat. 544, as amended, 29 U.S.C. 160, provides in part:

“(f) Any person aggrieved by a final order of the Board * * * denying in whole or in part the relief sought may obtain a review of such order * * * in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * * Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction * * * to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board * * *.”

Rule 15(d), Federal Rules of Appellate Procedure, effective July 1, 1968, provides:

“(d) Intervention. Unless an applicable statute provides a different method of intervention, a person who desires to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and file with the clerk of the court of appeals a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene shall be filed within 30 days of the date on which the petition for review is filed.”

STATEMENT

A. The Board's Initial Decision

In its first decision and order in this case, entered September 24, 1968, the Board found that, in 1967, Heck's, Inc., had violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by threatening to close its Clarksburg, West Virginia, retail store if its employees organized and by coercively interrogating and polling them about the Union (App. 2a).⁴ The Board also found that Heck's refusal to bargain was in bad faith and therefore violated Section 8(a)(5).

The Board explained (App. 3a-5a):

"... Respondent engaged in extensive violations of the Act which directly involved nearly every employee in the unit. We note further that the Board has recently found that this Respondent engaged in a pattern of similar unfair labor practices at its other stores in West Virginia and Kentucky, and that the Respondent has a labor policy in all its stores that is opposed to the policies of the Act. Earlier Board decisions involving the Respondent's operations show that President Haddad and Vice President Darnall, who together control the labor policy at all the Respondent's stores, have both actively participated at a number of stores in conduct found to be unlawful. Both have repeated their unlawful conduct in the present cases. Such flagrant repetition of conduct previously found unlawful shows a complete disregard by the Respondent of its obligations under the Act.

* * *

In the instant cases, the Respondent's refusal to grant recognition, followed by its extensive violations of the Act and its interference with the employees' free choice in the Board-conducted elec-

⁴"App." refers to the Appendices to this Opposition.

tion, clearly evidence its unlawful motive and justify an interference [sic] of bad faith. Consequently, we find, contrary to the Trial Examiner, that the General Counsel has established that the Respondent's refusal to recognize the Union was not based on a good-faith doubt of the Union's majority status. We find further that its refusal was for the purpose of utilizing the preelection period to undermine the Union majority, and that the Respondent thereby made it impossible to hold a free and fair election. Accordingly, we find that the Respondent refused to bargain with the Union, in violation of Section 8(a)(5) and Section 8(a)(1) of the Act.

In any event the Respondent's extensive Section 8(a)(1) violations, on which it embarked at about the time the Union attained its majority status and which made a free and fair election impossible, justify an order requiring the Respondent to bargain with the Union upon request as an appropriate remedy for the Respondent's 8(a)(1) violations."

The Board ordered remedies traditional in routine Section 8(a)(1) and (5) cases, but denied the Union's request for additional relief.

B. The Remand

On May 4, 1970, the court of appeals granted the Board's petition for enforcement of its order (433 F.2d 541), but, on the Union's petition for review (No. 22,318, in which Heck's did not intervene), remanded for further consideration of the adequacy of the remedies (433 F.2d at 543). The court explained (*ibid.*):

"Since 1964 Heck's has been the object of nine other unfair labor practice proceedings which show, in the Board's words, 'a labor policy in all its stores that is opposed to the policies of the Act.'"
[Footnote omitted.]

"The Board's findings of bad faith and flagrant misconduct lead us to remand this case to the Board for reconsideration, in the light of our recent decision in *Tiidee Products [International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB]*, 426 F.2d 1243, cert. denied 400 U.S. 950], of the Union's request for further relief."

⁷ The Union requested a broad range of further relief: . . . [including] Union expenses expended to overcome the effects of the Company's unlawful refusal to bargain."

In its cited *Tiidee Products* case, the court of appeals, finding that the Company's "refusal to bargain was a clear and flagrant violation of the law" (426 F.2d at 1248), had held that in such cases "[e]ffective redress for statutory wrong should both compensate the party wronged and withhold from the wrongdoer the fruits of its violation." It had further held that the Board was empowered to "do something [more than it had traditionally done] to advance the policies of the Act, and prevent the employer from having a free ride during the period of litigation." 426 F.2d at 1251. Among other things the court held the Board could do was assess against respondent the "costs of litigation." *Ibid.*, note 11. The court, therefore, remanded to the Board for reconsideration the various requests of the union for additional relief, *e.g.*, to compensate the employees for loss of collective-bargaining benefits during the period of the employer's bad faith refusal to bargain, and "such lesser, alternative remedies as an award to the Union for excess organization costs caused by the Company's behavior, or for the costs of having to litigate a frivolous case, or for a combination of these" (426 F.2d at 1253, n. 15).

C. The Board's Supplemental Decision

The Board accepted the remand in this case, and all parties, including Heck's, filed briefs with the Board. The Board issued its supplemental decision, 191 NLRB No. 146, on July 1, 1971, before handing down its decision on remand in *Tiidee*.

In preliminary discussion, the Board stated (Bd. App. 29A):

"Viewed in isolation, the Respondent's conduct as found in this case, although serious, is not so aggravated or pervasive as to warrant additional special remedies. However, as we have had occasion to point out, in a somewhat different context with respect to this Respondent, it is by now clear that Respondent's conduct here is but part of a pattern of unlawful antiunion conduct engaged in by Respondent's top officials throughout Respondent's entire operations for the purpose of denying to all of its employees the exercise of those rights guaranteed the employees by Section 7 of the Act. In such circumstances conduct at a single store such as this can no longer be viewed in isolation; Respondent's conduct must, rather, be viewed in its total context. As so viewed, Respondent's unfair labor practices are clearly aggravated and pervasive. It is, accordingly, against this background of companywide aggravated and pervasive unfair labor practices that we consider the Union's request for additional relief in this particular case." [Footnote omitted.]

The Board concluded that it was appropriate to grant certain additional non-monetary remedies, but refused to approve the Union's requests, *inter alia*, that employees be made whole for loss of collective-bargaining benefits and for a company-wide bargaining order without proof of majority in individual store units. The

Board also refused to order reimbursement of excess organizational costs and expenses of litigation engendered by Heck's flagrant illegal conduct.

As to the latter, the Board found that the Company's "aggravated and pervasive" unfair labor practices had imposed on the Union excess organizational expenses and costs of litigation.⁵ But it refused to order reimbursement for specified reasons (Bd. App. 38A-39A):⁶

"To determine the appropriateness of these reimbursement requests, we must, we believe, consider the role of a charging party under the statutory scheme in the light of the basic principles, that Board orders must be remedial not punitive,¹⁶ and collateral losses are not considered in framing a reimbursement order.¹⁷ As the Supreme Court has stated,¹⁸ the statutory scheme involves an interblending of public and private interests, and the participation of a charging party in the proceedings, before the Board and in the courts, can serve a public as well as its own private interests. Nonetheless, it is the Board which has been given primary initial responsibility to determine and pro-

¹⁶ *Republic Steel Corporation v. N.L.R.B.*, 311 U.S. 7, 11-12.

¹⁷ *Gullett Gin Company, Inc. v. N.L.R.B.*, 340 U.S. 361, 364.

¹⁸ *Intl. Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 283 v. Scofield*, 382 U.S. 205, 217, *et seq.*

⁵ "[W]e are not unmindful of the probability that the Charging Party has spent more money on organizational costs and attorney's fees than it would have spent had the Respondent not refused to bargain." (Bd. App. 38A.)

⁶ Only by ignoring the paragraph quoted above, p. 7, *supra*, can Board counsel argue (Pet. pp. 6-7, 12) that the Board denied the relief in issue here because it did not regard Heck's unfair labor practices as sufficiently "widespread, aggravated, and pervasive," rather than for the legal reasons quoted in the text—which are the ones the Board itself explicitly advanced.

tect the public interest in the elimination of obstructions to commerce resulting from labor disputes. Such protection of the public interest as may result from the charging party's participation in litigation must be regarded, we believe, as incidental to its efforts to protect its own private interests. Given this statutory framework, we conclude that the public interest in allowing the Charging Party to recover the costs of its participation in this litigation does not override the general and well-established principle that litigation expenses are ordinarily not recoverable.¹⁹

¹⁹ *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714-717. Compare *Newman v. Piggie Park Enterprises*, 390 U.S. 400, where litigation expenses were awarded under a statute (42 U.S.C. 2000a *et seq.*) which places greater reliance on private action for the vindication of public rights."

On July 9, 1971, the Union again petitioned for review. On August 13, 1971, its counsel sent a copy of the petition to Heck's counsel. By accompanying letter, Heck's counsel was notified that this petition had been filed seeking to review the Board's order "insofar as it failed to provide the full relief requested by the Union," and Heck's counsel was specifically referred to the court of appeals' decision in *Tiidee* (App. 8a-9a). On August 20, 1971, the Board served on counsel for Heck's the certified list of the record and docket entries filed with the court on the Union's petition (App. 10a-12a). Heck's chose to ignore the review proceeding, and did not move to intervene in the court of appeals.

D. The Board's Supplemental Decision in *Tiidee*

On January 24, 1972, after the instant case had been fully briefed below, but before oral argument, the Board issued its supplemental decision and order in *Tiidee Products*, 194 NLRB 1234. While the Board con-

cluded that a make-whole order was not appropriate, it granted additional relief, both monetary and non-monetary, explaining:

"... the Board believes that the alternative remedies provided hereinafter will undo some of the baneful effects pointed out by the court as having resulted from Respondent's 'clear and flagrant violation of the law.' They will, for one, aid the Union in rebuilding its strength so that it may bargain effectively with Respondent. Also, by requiring Respondent to pay some of the Board and union litigation costs occasioned by its misconduct, similar 'brazen' refusals to bargain will be discouraged." [Footnote omitted.] (At p. 1235.)

It characterized the proffered rationale for reimbursement of excessive organizing costs and litigation expenses as follows (at p. 1236):

"The Union asserts that an award to it of organizational expenses, litigation costs and expenses, and lost initiation fees and dues would meet another of the court of appeals' objections to the Board's order; *viz.*, that our traditional remedy rewarded Respondent's delaying tactics and increased the likelihood that similar frivolous litigation would clog future Board and court calendars."

It denied reimbursement of organizing expenses because (*ibid*):

"It is clear that the Union incurred no extraordinary organizational expenses because of Respondent's patently frivolous objection to the election and subsequent refusal to bargain. Despite certain already remedied preelection unlawful Respondent conduct, the Union was selected by the employees after a 2-month campaign at the first election held. *We find, therefore, no nexus* between Respondent's unlawful conduct here under exami-

nation and the Union's preelection organizational expenses and, *accordingly, we shall not award them to the Union.*" (Emphasis added.)

With respect to the Union's claim for litigation expenses, the Board stated (*ibid.*):

"We find merit, however, in the Union's request that it be reimbursed for certain litigation costs and expenses. Normally, as the Board recently noted, litigation expenses are not recoverable by the charging party in Board proceedings even though the public interest is served when the charging party protects its private interests before the Board.¹⁶

We agree with the court, however, that frivolous litigation such as this is clearly unwarranted and should be kept from the nation's already crowded court dockets, as well as our own. While we do not seek to foreclose access to the Board and courts for meritorious cases, we likewise do not want to encourage frivolous proceedings. The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available. Accordingly, in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper to order Respondent to reimburse the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of these cases Accordingly, we shall order Respondent to pay to the Board and the Union the above-mentioned litigation costs and expenses.¹⁷

¹⁶ *Heck's, Inc.*, *supra*, fn. 20.

¹⁷ See also Rule 38, Federal Rules of Appellate Procedure. Cf. *Sprague v. Ticonic National Bank*, 307 U.S. 161, 166; *Schauffler v. United Association of Journeymen*, 246 F.2d 867 (C.A. 3, 1957)."

Thereupon, the Union moved to lodge the Board's *Tiidee* decision with the court below, arguing, in a supporting memorandum, that the rationale of that decision undermined and invalidated the Board's denial of litigation and organizing expenses in this case. The Board filed no response to that motion, and at no time prior to, or at, oral argument of this case did the Board request that this case be remanded for reconsideration in the light of its supplemental decision in *Tiidee*.

E. The Supplemental Decision of the Court of Appeals

The court below issued its supplemental decision herein on March 21, 1973. It agreed that in the supplemental decision in *Tiidee* "... the Board itself has subsequently departed from the rationale upon which its refusal of litigation expenses in this case is based" (Bd. App. 9A). It explained (Bd. App. 9A-10A):

"We think the considerations which motivated the Board to give this enlarged relief in *Tiidee* are also operative here. Although the Board in its Supplemental Decision in this case has nowhere characterized the litigation as frivolous, it has used the language of 'clearly aggravated and pervasive' misconduct; and in its original opinion it questioned Heck's good faith because of its 'flagrant repetition of conduct previously found unlawful' at other Heck's stores. It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board. We hold that the case before us is an appropriate one for according such relief."

Similarly, as to organizational expenses, the court held (Bd. App. 11A):

"As in the case of litigation expenses, the Board, upon remand in *Tiudee*, has shifted its ground with respect to organizational costs. In its Supplemental Decision in *Tiudee*, the Board did not allow the claim for excess organizational expenses, but it justified that action solely on the ground that '... the Union was selected by the employees after a 2-month campaign at the first election held;' and, because of this circumstance, the Board found '... no nexus between Respondent's unlawful conduct here under examination and the Union's preelection organizational expenses' Thus, in *Tiudee* the Board appears to have denied organizational costs because it believed that, on the facts of that case, no unusual organizational costs had been incurred.

"This obviously is quite a different thing from saying that the policies of the Act forbid the allowance of such costs in cases like the one before us, where the Board has in terms indicated its awareness of 'the probability' that costs were experienced by reason of Heck's intransigence. Under these circumstances we find nothing in the Board's Supplemental Decision which constitutes an adequate justification for the denial of extraordinary organizational costs to which the Union was exposed by reason of Heck's policy of resisting organizational efforts and refusing to bargain; and we think that provision for such costs should have been included in the remedies fashioned by the Board on remand."

F. Subsequent Proceedings

On April 4, 1973, Heck's filed a two-page motion for leave to intervene "so as to be entitled to seek a rehearing *en banc* and, if thereafter necessary, review by the

United States Supreme Court." On April 17, Heck's tendered a petition for rehearing. The Union filed a brief in opposition to the motion to intervene, and, on May 18, 1973, the court (Chief Judge Bazelon dissenting) denied that motion.

The Board filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc on substantially the same grounds it asserts in this Court. The petition was denied and no judge requested a vote on the suggestion for rehearing *en banc* (Bd. App. 24A, 25A).

ARGUMENT

1. As we demonstrate below, the only question actually presentable on the Board's petition is whether the court below correctly concluded that the Board's supplemental decision in *Tüdee* fatally undermined the Board's rationale for refusing reimbursement in this case, leaving that refusal arbitrary and therefore "unwarranted in law." *American Power Co. v. S.E.C.*, 329 U.S. 90, 112-113. Inasmuch as that question is so plainly uncertworthy, petitioner does not even present it, electing instead to devise a question which carries the trappings of significance and novelty, namely, "the permissible scope of a court's authority to review an agency's remedial order which is attacked as inadequate to remedy the violation" (Bd. Pet. p. 9). But the premise on which that "presented" question rests—that the court below applied a different standard of review than is applicable where a remedy is alleged to be excessive—is entirely imaginary, and the reasons for review advanced at pp. 9-10 of the Board's petition are addressed to a straw-man.

Nothing in the opinion below even remotely suggests that the court applied or purported to apply a different

standard of appellate review to Board remedies claimed to be inadequate than to remedies attacked as excessive. To the contrary, in upholding the Board's denial of other additional remedies, the court made clear its awareness and application of the appropriate standard of review.⁷ The most searching scrutiny of the court's opinion can unearth no shred of evidence that, in its treatment of litigation and organization expenses, the court applied a different or improper standard of review.⁸

⁷ The Board's refusal to grant the Union access to employees on company property was sustained as "an exercise of judgment which we are not disposed to overturn" (Bd. App. 6A). The Board's denial of the Union's request for a company-wide bargaining order was sustained as based on "considerations [which] seem to us rational in nature and well within the range of respect traditionally to be accorded by us to the Board's determinations [citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612, n. 32 (1969); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *International Union of Electrical Workers v. NLRB*, 426 F.2d 1243, 1250 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 950]" (Bd. App. 7A-8A). (The first two of the cited cases involved claims by a respondent that the Board's remedy was too broad. In the third case (*Tiidee Products*), the Board accepted the remand. The joint citation of these three precedents is conclusive evidence that the Court of Appeals was not applying a double standard). In upholding the Board's determination that a make-whole remedy was not warranted, the court said: "[W]e are not inclined to say that the Board's treatment of this issue on remand is beyond the wide range of latitude traditionally accorded the Board in the matter of remedies" (Bd. App. 16A-17A).

⁸ While petitioner asserts (and we agree) that the *same* standard is applicable whether the remedy is attacked as excessive or inadequate (Bd. Pet. pp. 9, 10, 11), that standard necessarily permits reversal wherever the grant or denial is "unwarranted in law or . . . without justification in fact." *American Power Co. v. S.E.C.*, *supra*. The quotations relied on by the Board requiring special deference to its expertise (Bd. Pet. p. 11) are particularly inapt in this case inasmuch as here the Board's denial of relief did not

The second question is based on the premise that the court below substituted its discretion for the Board's discretion in determining the appropriate remedy (Bd. Pet. p. 12). That premise is invalid because it is based on the false assumption that the Board refused to order reimbursement on the theory that "the violations in this case were not so aggravated and their effects not so broad as to require" it (p. 8, n. 6, *supra*), rather than for the legal reasons specified in the Board's own opinion (Bd. App. 38A-39A, quoted *supra*, pp. 8-9).⁹

2. Significantly, the Board does not argue that a question warranting certiorari would be presented if the court below was correct in holding that "the Board's decision in *Tiidee* undercut its rationale for denying reimbursement in this case." (Bd. Pet. p. 12.) It argues only that, as to this, the court below "was in error." But unless the authority of a court of appeals under Section 10(e) and (f) of the Act does not extend to examining the rationale of remedial orders for inconsistency and arbitrariness (which even the Board does not contend), the alleged incorrectness of the de-

rest "on a variety of factors peculiarly within the expert understanding of the [Board]," *Moog Industries v. FTC*, 355 U.S. 411, at 413, or "require the specialized experienced judgment of the [Board]," *FTC v. Universal-Rundle Company*, 387 U.S. 244, at 250, but rather was of "such a nature as to be peculiarly appropriate for independent judicial ascertainment as [a] 'question[] of law' ", *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508, inasmuch as the Board purported to follow the "general and well established [legal] principle" governing award of litigation expenses (p. 9, *supra*), a matter in which the courts, rather than the Board, have "expert understanding" and "specialized experience," pp. 17-18, *infra*.

⁹ In any event, since the NLRB reports reveal no more than a handful of recidivists like Heck's, who deliberately flout their obligations under the Act at every opportunity, to excuse Heck's is to hold, in effect, that the relief in issue is *never* available where what the Board calls a "non-frivolous" defense is offered.

cision below does not warrant review. The decision is merely an application of the settled principle that "... the Board cannot act arbitrarily nor can it treat similar situations in dissimilar ways." *Burinskas v. NLRB*, 357 F.2d 822, 827 (D. C. Cir.); *Cooper Thermometer Company v. NLRB*, 376 F.2d 684, 691 (2 Cir.); *J. P. Stevens & Co. v. NLRB*, 406 F.2d 1017, 1024 (4 Cir.).

The Board does not deny that the court below was correct in holding that *Tiidee* undercut the Board's rationale for refusing reimbursement insofar as that rested on the assumed subordinate role of the charging party and the rule against punitive damages and reimbursement of collateral losses. (Bd. App. 8A-9A, 10A-11A). It insists, however (Bd. Pet. pp. 12-13), that the court below erred in rejecting the Board's attempt to confine its *Tiidee* rationale to employers who "follow a pattern of resisting union organization" (Bd. App. 10A), by litigating "frivolous defenses," excluding those, like Heck's, who do so by "clearly aggravated and pervasive misconduct," undertaken in "bad faith," through "flagrant repetition of conduct previously found unlawful." But its petition does not challenge the insight of the court below that both types of conduct "unduly burden the processes of the Board and the courts" (Bd. App. 10A), and that the Board's avowed objective of affording "speedy access to uncrowded Board and court dockets" (194 NLRB at 1236), rationally compels identical remedies.

Petitioner's argument, then, reduces to the claim (Bd. Pet. p. 13) that the Board was "not unreasonable" in adhering in this case to "the traditional American rule," under which, it says, in deference to "the right of a respondent to obtain an adjudication of the

issues he presents, * * * attorney's fees are not ordinarily recoverable * * *." But the "traditional * * * rule" does not distinguish between bad faith violations and bad faith defenses. It awards attorney's fees as well "where the behavior of a litigant has reflected a willful and persistent * * * defiance of the law" (*Brewer v. School Board of City of Norfolk, Virginia*, 456 F.2d 943, 949 (4 Cir.)), as where the proffered defenses are frivolous. *Vaughan v. Atkinson*, 369 U.S. 527, 530; *Siegel v. William E. Bookhultz & Sons, Inc.*, 419 F.2d 720, 723-724 (D. C. Cir.) ("where the conduct of his opponent has been oppressive"); *Local 149, UAW v. American Brake Shoe Co.*, 298 F.2d 212, 215 (10 Cir.) (where "the wrongdoer's conduct is unconscionable, fraudulent, willful, in bad faith, vexatious, or exceptional."). To the extent that the denial of reimbursement in this case is defended as "reasonable" by reliance on the "traditional American rule," it thus rests on an error of law which the court below was not merely empowered, but obliged, to correct.

3. The Board's claim that there is no inconsistency between *Tiidee* and this case in the Board's treatment of excess organization expenses depends on construing *Tiidee* to mean merely that the Board "found it unnecessary to consider the appropriateness of the remedy on the facts there * * *." (Bd. Pet. p. 14). But the court below was clearly correct in construing *Tiidee* to mean that if there had been a nexus between the employer's unfair practices and excess organizational expenses, reimbursement would have been ordered. For, as the court observed (Bd. App. 10A), the only reasons initially advanced by the Board for refusing reimbursement of excess organizational costs were the as-

served "subordinate role of the charging party in the scheme of the Act," and the strictures against punitive orders and reimbursement of collateral losses. Having retreated from those excuses in *Tiidee*, nothing remained to justify continued refusal. Nexus having been found here, the principle of recoupment for such expenses having been adopted by the Board in *Tiidee*, and the standard having been set in this case of treating the award of organizational expenses and litigation expenses *in pari materia* (Bd. App. 38A-39A), the court was irresistibly driven to its conclusion that nothing in the Board's supplemental decision in this case "constitutes an adequate justification" for denial of the claim for extraordinary expenses.

The Board further contends (Bd. Pet. p. 14) that "if there were an inconsistency between the decisions, * * * the court below should not have resolved it without first obtaining the views of the Board." But the court was entirely justified in concluding that the Board's attempted differentiation of *Heck's* in *Tiidee*, p. 11, *supra*, was its final word on the subject. Particularly was this conclusion warranted since the Board filed no response to the Union's argument that the Board's supplemental decision in *Tiidee* required reversal here, p. 12, *supra*, and at no time until after the court issued its decision did the Board request a remand for reconsideration or amplification of its views. Contrary to petitioner's hypothesis that the court below might have "considered that the Board had not adequately explained its reasons for denying reimbursement in this case" (Bd. Pet. p. 14), the court made clear that it deemed the Board's explanation "adequate", but the result predicated thereon unlawful. Indeed, the court emphasized that this was its view by refusing to con-

sider alternative justifications invented by Board counsel:

"Counsel for the Board in their brief in this court attempt to supply a number of reasons why excess organizational costs should not be taken into account, such as their assertedly speculative nature and their invitation of collateral litigation which burden the Board's administration of the Act. These are counsel's reasons, not the Board's; and, under familiar principles of judicial review of administrative agencies, we appraise the Board's actions only in terms of the latter." (Bd. App. 11A, note 8). Cf. Bd. Pet. p. 14, n. 9.

In sum, the court below justifiably concluded that it was time this case came to an end. Important considerations of judicial administration support that result. A second remand would entail further unconscionable delay, defeating "one of the objectives of the Labor Act—the prompt determination of labor disputes." *Auto Workers v. Scofield*, 382 U.S. 205, 213. Certainly, the Board cannot justifiably complain because the court of appeals in this case took it at its word. Like any other litigant, the Board is not entitled to a third bite at the cherry. If the Board desires in the future to predicate denial of reimbursement of organizational expenses on different grounds, the decision below will not constitute a bar. Surely the result of this particular case is not an issue of national importance warranting review by this Court, and no conflict of decisions is even claimed.

4. The Board's asserted fear that "the inevitable consequence of this decision will be a substantial number of cases in [the court below] challenging the Board's refusal to grant extraordinary relief" (Bd. Pet. p. 15)

is footless. As construed by the court of appeals, the Board's reimbursement rationale extends only to "employers who follow a pattern of resisting union organization" by flagrantly unlawful means (Bd. App. 10A), in "complete disregard" of their statutory obligations (App. 4a). The Board does not even claim that more than a handful of employers are in that category. Thus, even this conjured potential of the decision does not warrant the attention of this Court.

5. Heck's petition asks this Court to fashion broad principles of intervention in appellate proceedings, drawing analogies to the Federal Rules of Civil Procedure, the cases governing standing, and even the Freedom of Information Act (Heck's Pet. pp. 7-22). What the Company ignores is that this Court, with the approval of Congress, has already formulated a rule for appellate intervention which is completely dispositive of this case.

Rule 15, Federal Rules of Appellate Procedure, effective July 1, 1968, governs the procedure for review and enforcement of agency orders. Subsection (d) thereof, entitled "Intervention," provides, in pertinent part,

"... a person who desires to intervene in a proceeding under this rule shall serve upon all parties ... a motion for leave to intervene ... A motion for leave to intervene ... shall be filed within 30 days of the date upon which the petition for review is filed."

Heck's, which clearly had a *right* to intervene under *Auto Workers v. Scofield*, 382 U.S. 205, also had a *duty* to move to intervene *timely* under Rule 15(d). Instead of so moving, however, the Company, being fully advised that the Union was asking the court below to take

action significantly affecting its interests, deliberately sat on the sidelines for almost two years, until the court handed down a decision adverse to it.¹⁰

Having failed to comply with Rule 15(d), the Company was properly ruled out of court. It is simply preposterous for Heck's to ask this Court to extricate it from the position it deliberately adopted by refusing to move timely for intervention. It is particularly ironic that the very decision upon which Heck's relies for jurisdictional purposes, *Auto Workers v. Scofield*, *supra*, afforded intervention rights to successful charged parties, such as this Company, explicitly to avoid "unnecessary duplication of proceedings," to "centralize . . . the controversy and limit it to a single decision, accelerating final resolution," and to allow the would-be intervenor "to present [his] arguments to a reviewing court which has not crystallized its views" (382 U.S. at 212, 213). Heck's thirteenth

¹⁰ The record shows that the petition for review was filed by the Union on July 9, 1971. By inadvertent error, Heck's was not served with a copy of the petition at that time. However, counsel for the Union wrote to Heck's on August 13, 1971, enclosing a copy of the petition, notifying counsel that the petition had been filed to review the Board's order "in so far as it failed to provide the full relief requested by the Union," and specifically referring to the court's decision in *Tiidee* (p. 9, *supra*). Furthermore, on August 20, 1971, the Board served on counsel for Heck's the certified list of the record and docket entries (*ibid.*). The Company has never raised any question, and there can be none, about the adequacy of notice to it. Late service of the petition would, of course, have constituted justification for advancement of the 30-day period in which Heck's could file its motion for leave to intervene, had Heck's sought such advancement, but that period would have expired no later than September 15, 1971. Heck's never claimed lack of actual knowledge or timely notice of the petition as an excuse for its failure to move to intervene earlier.

hour attempt to intervene below is completely at cross-purposes with the policy enunciated by this Court for permitting intervention in the first place.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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October 29, 1973

APPENDIX

1a

APPENDIX A

172 NLRB No. 255

D-1328

Clarksburg, W. Va.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 6-CA-3989

Cases 6-RM-326

HECK'S, INC.

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF
NORTH AMERICA, FOOD STORE EMPLOYEES UNION, LOCAL
No. 347, AFL-CIO

Decision and Order

On May 7, 1968, Trial Examiner Frederick U. Reel issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision, and the General Counsel and the Charging Party filed cross-exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision,

the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings,¹ conclusions, and recommendations² of the Trial Examiner, as modified below.

1. The Trial Examiner found, and we agree, that the Respondent engaged in numerous violations of Section 8(a)(1) by conduct which included threats, interrogation, coercive interviews, and illegal polls.³ Such conduct, which took place during May, June, and July 1967, prior to the election held on July 13, was directed at 33 of the 38 employees in the unit.

2. The Trial Examiner found that the Union represented a majority of the employees in the appropriate unit, but

¹ As found by the Trial Examiner, an election was conducted on July 13, 1967, in the following stipulated unit, which we find to be appropriate:

All employees of the Respondent's Clarksburg, West Virginia, store, excluding supervisors, guards, and professional employees.

The Union lost the election by a vote of 19 to 16, and thereafter filed timely objections to conduct affecting the election. We sustain the Union's Objections Nos. 1, 2, 3, 5, and 6, insofar as they related to the Respondent's unlawful conduct committed after May 29, 1967, the date of the filing of the petition in Case 6-RM-326. Accordingly, as recommended by the Trial Examiner, we shall set aside the election.

² The Charging Party in its exceptions urges the appropriateness of certain remedies in addition to those recommended in the Trial Examiner's Decision. We deem it inappropriate in this proceeding to grant this request to depart from our existing policies with respect to remedial orders, and, therefore, find no merit in these exceptions.

³ The General Counsel and the Charging Party have excepted to the Trial Examiner's failure to find other alleged violations of Section 8(a)(1). We deem it unnecessary to pass upon these allegations as such conduct would, in any event, be cumulative, and would not enlarge the scope of our order.

the Trial Examiner further found that the General Counsel failed to establish that the Respondent did not have a good-faith doubt as to the Union's majority when it refused to bargain, and, accordingly, he did not sustain the Section 8(a)(5) allegation of the complaint. We find merit in the exceptions of the General Counsel and the Charging Party to this finding for the reasons set forth below.

As already noted, the Respondent engaged in extensive violations of the Act which directly involved nearly every employee in the unit. We note further that the Board has recently found that this Respondent engaged in a pattern of similar unfair labor practices at its other stores in West Virginia and Kentucky, and that the Respondent has a labor policy in all its stores that is opposed to the policies of the Act.⁴ Earlier Board decisions involving the Respondent's operations show that President Haddad and Vice President Darnall, who together control the labor policy at all the

⁴ In *Heck's, Inc.*, 171 NLRB No. 112, issued subsequent to the Trial Examiner's Decision in this case, the Board stated:

It is clear that the Respondent has the same labor relations policy affecting all employees at all of its stores, [footnote omitted] and this policy is based, in part, on opposition to the freedom of choice by its employees in regard to collective bargaining. It is also apparent that . . . the proximity of the stores, and the active participation of top company officials in carrying out this illegal labor policy, all have the effect of emphasizing individual incidents of unlawful conduct. The repetition of conduct which had earlier been found unlawful at this same store and to many of the same employees further indicates a disregard for the policies of the Act, and the impact of such repeated conduct therefore is much greater than in the initial incident.

Upon review of all the relevant factors herein, we conclude that the Employer's unlawful conduct in this case is amplified by, and is part of its company-wide antiunion policy, [footnote omitted] and its impact must be evaluated in the context of its prior flagrant unlawful practices. Such conduct clearly reflects a rejection of the collective-bargaining principle.

Respondent's stores, have both actively participated at a number of stores in conduct found to be unlawful.⁵ Both have repeated their unlawful conduct in the present cases. Such flagrant repetition of conduct previously found unlawful shows a complete disregard by the Respondent of its obligations under the Act.

In normal circumstances, an election by secret ballot, if free from improper or unlawful interference, is a more satisfactory means of determining employees' wishes than a showing of authorization cards. Accordingly, an employer who withholds recognition on the basis of a good-faith doubt of a union's majority does not violate Section 8(a)(5) of the Act, but may withhold recognition until the results of an election resolve his doubt.⁶ In order to determine, whether an employer's insistence upon a Board election is based upon such a good-faith doubt, we consider all the relevant circumstances, including any unlawful conduct of the Employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct. In the instant cases, the Respondent's refusal to grant recognition, followed by its extensive violations of the Act and its interference with the employees' free choice in the Board conducted election, clearly evidence its unlawful motive and justify an interference of bad faith.⁷ Consequently, we

⁵ *Heck's, Inc.*, *Ibid*; *Heck's Discount Store*, 150 NLRB 1565, enfd. 369 F.2d 370 (C.A. 6); *Heck's, Inc.*, 156 NLRB 760, enfd. in part 386 F.2d 316 (C.A. 4); *Heck's, Inc.*, 159 NLRB 1151, enfd. 387 F.2d 65 (C.A. 4); *Heck's, Inc.*, 159 NLRB 1331, consent decree entered, June 13, 1967, (No. 11, 390, C.A. 4); *Heck's, Inc.*, 166 NLRB No. 32, enfd. in part — F.2d — (C.A. 4); *Heck's, Inc.*, 166 NLRB No. 38, enfd. in part — F.2d — (C.A. 4); *Heck's, Inc.*, 170 NLRB No. 53. See also *Heck's, Inc.*, 158 NLRB 121, enfd. 387 F.2d 65 (C.A. 4).

⁶ *Aaron Brothers Company of California*, 158 NLRB 1077, 1078; *H & W Construction Company*, 161 NLRB 852, 857.

⁷ *Hammond & Irving, Incorporated*, 154 NLRB 1071, 1073.

find, contrary to the Trial Examiner, that the General Counsel has established that the Respondent's refusal to recognize the Union was not based on a good-faith doubt of the Union's majority status. We find further that its refusal was for the purpose of utilizing the preelection period to undermine the Union's majority, and that the Respondent thereby made it impossible to hold a free and fair election. Accordingly, we find that the Respondent refused to bargain with the Union, in violation of Section 8(a)(5) and Section 8(a)(1) of the Act. In any event the Respondent's extensive Section 8(a)(1) violations, on which it embarked at about the time the Union attained its majority status and which made a free and fair election impossible, justify an order requiring the Respondent to bargain with the Union upon request as an appropriate remedy for the Respondent's 8(a)(1) violations.⁸

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Heck's Inc., Clarksburg, West Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning their union membership, sympathies, or activities.

(b) Threatening employees that choice of a union as their collective-bargaining representative would lead to the closing of the store.

(c) Illegally polling employees in a nonsecret ballot election to ascertain which employees support the Union.

⁸ *Bishop and Malco, d/b/a Walkers*, 159 NLRB 1159; *Bryant Chucking Grinder Company*, 160 NLRB 1526, 1530, enf'd. 389 F.2d 565 (C.A. 2); *Better Val-U Stores of Mansfield, Inc.*, 161 NLRB 762; *Fabricators, Incorporated*, 168 NLRB No. 21.

(d) Interviewing employees under coercive circumstances concerning matters relating to unfair labor practice charges and objections to an election.

(e) Refusing to bargain with Amalgamated Meat Cutters and Butcher Workmen of North America, Food Store Employees Union, Local No. 347, AFL-CIO, as the exclusive representative of its employees in the following appropriate unit:

All employees of the Respondent's Clarksburg, West Virginia, store, excluding supervisors, guards, and professional employees.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of all the Respondent's employees in the unit found to be appropriate and, if an agreement is reached, embody such understanding in a signed agreement.

(b) Post at each of its retail stores copies of the attached notice marked "Appendix."⁹ Copies of said notice, on forms provided by the Regional Director for Region 6, shall, after being duly signed by the Respondent, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the

⁹ In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order."

Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director, in writing, within 10 days from the date of this Decision, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the election held on July 13, 1967, in Case 6-RM-326, be, and it hereby is, set aside, and all proceedings in that case be, and they hereby are, vacated.

Dated, Washington, D.C. Sep 24 1968

FRANK W. McCULLOCH, *Chairman*
JOHN H. FANNING, *Member*
SAM ZAGORIA, *Member*
National Labor Relations Board

(Seal)

APPENDIX B

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Kenneth S. Lewis



August 13, 1971

Re: Heck's Inc.

191 NLRB No. 146

Dear Mr. Holroyd:

In response to your letter of August 5, 1971, please be advised that the Union filed a petition to review the order of the National Labor Relations Board on July 9, 1971. I am enclosing herewith a copy of our petition.

We hereby renew our request that your client, Heck's Inc., comply with the order of the Board as outlined in Mr. Gore's letter of July 27, 1971. As you know, the Union requested fuller relief than was originally ordered by the Labor Board in this case. Our request for additional remedies was considered meritorious by the Court of Appeals for the District of Columbia Circuit and accordingly the case was remanded to the Board for consideration of these remedies. In the decision referred to above, the Board considered our request for remedies on remand and

found certain of them to be appropriate in this case. The Union is petitioning the Court of Appeals to review the recent order only in so far as it failed to provide the full relief requested by the Union. We do not intend to raise to the Court of Appeals those remedies which the Board found appropriate and ordered on remand. In reference to the issues currently before the Court of Appeals for the District of Columbia, I would refer you to *NLRB vs. Ogle Protection Service*, 77 LRRM 2832; *NLRB vs. United Shoe Machinery Corp.*, 77 LRRM 2719; and *I.U.E. vs. NLRB [Tüdee Corp.]*, 426 F. 2d 1243. Since the remedies ordered by the Board in its recent decision, as far as it goes, are not being challenged by the Union in the Court of Appeals and, indeed, have not previously been specifically challenged by Heck's before the Labor Board, we hereby renew our request that you comply immediately with the National Labor Relations Board order entered July 1, 1971 as outlined in our letter of July 27, 1971.

Very truly yours,

JUDITH A. LONNQUIST

JAL/vw

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1550

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED
MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH
AMERICA, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Certified List of the National Labor Relations Board

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.115, Rules and Regulations of the National Labor Relations Board—Series 8, hereby certifies that the list set forth in the Index attached hereto, consisting of one volume, constitutes a full and accurate transcript of the entire record of a proceeding had before said Board and known upon its records as Case Nos. 6-CA-3989 and 6-RM-326.

IN TESTIMONY WHEREOF, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 20th day of August, 1971.

/s/ OGDEN W. FIELDS
Ogden W. Fields

Executive Secretary

National Labor Relations Board

(Seal)

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¹ Heck's Inc. was Respondent before the Board.

² Petitioner in No. 71-1550, was Charging Party before the Board.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1550

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED
MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH
AMERICA, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Certificate of Service

The undersigned certifies that one copy each of the Board's certified list with index attached and chronological list of relevant docket entries in the above-captioned matter has this day been served by first class mail upon the following counsel at the addresses listed below:

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/s/ MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D.C.
August 20, 1971





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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-370

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-17A)¹ is reported at 476 F. 2d 546. The supplemental decision and amended order of the Board (Pet. App.

¹ "Pet. App." refers to the appendix to the petition. "Op. App." refers to the appendix to the brief in opposition. "A." refers to the separate appendix to the briefs.

26A-44A) are reported at 191 NLRB 886. The earlier decisions of the court of appeals (A. 23-27) and of the Board (Op. App. 1a-7a; A. 3-22) are reported at 433 F. 2d 541 and 172 NLRB 2231, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18A-23A) was entered on April 26, 1973. The Board's timely petition for rehearing was denied on May 30, 1973 (Pet. App. 25A). The petition for a writ of certiorari was filed on August 28, 1973, and was granted on December 3, 1973 (A. 46). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a remedial order of the National Labor Relations Board which is challenged by the charging party as inadequate to effectuate the purposes of the Act is entitled to the same respect by a reviewing court as an order challenged as going further than necessary to effectuate those purposes.

2. Whether the court of appeals exceeded its authority as a reviewing court by substituting its judgment for that of the Board concerning the appropriate remedy for unfair labor practices.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

SECTION 8(a) It will be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

SECTION 10

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States * * * for the enforcement of such order * * *. Upon the filing of such petition, the court * * * shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * *

STATEMENT

A. THE INITIAL PROCEEDINGS

This case was twice before the Board. In the first proceeding, the Board determined that Heck's Inc., had engaged in unfair labor practices in resisting, at its Clarksburg, West Virginia, retail store, the organizational drive of the respondent union. The Board found that Heck's had violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by interrogating and threatening employees concerning the union and by polling employees by a non-secret ballot to determine their support for the union, and that it had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to recognize and bargain with the union despite the existence of valid authorization cards from a majority of the employees (Op. App. 2a, 5a).²

² The Trial Examiner, finding that the General Counsel had failed to prove that the company lacked a good faith doubt of the union's majority status, had dismissed the refusal-to-bargain allegation of the complaint. The Trial Examiner noted that "in at least three preceding cases arising in other stores * * * the Company's challenge to card majorities proved well-founded" (A. 17). He recommended a bargaining order only to remedy the Section 8(a)(1) violations, which he found had "destroyed the Union's previously existing majority status" (A. 18).

The Board found that the company's "extensive violations of the Act and its interference with the employees' free choice in the Board's conducted election, clearly evidence its unlawful motive and justify an inference of bad faith" (Op. App. 4a). Accordingly, it concluded that the company's refusal to bargain violated Section 8(a)(5) of the Act. The Board further found that the company's Section 8(a)(1) violations "made a free and fair election impossible" (Op. App. 5a). It thus agreed with the Examiner that, in any event, a bargaining order was appropriate to remedy those violations (*ibid.*).

The Board ordered Heck's to cease and desist from interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. The Board also ordered the company to bargain with the union as the representative of the employees at its Clarksburg store and to post appropriate notices at each of its 11 stores (Op. App. 6a-7a). The Board denied the union's request for additional remedies, finding it "inappropriate in this proceeding to grant this request to depart from our existing policies with respect to remedial orders" (Op. App. 2a, n. 2).

The court of appeals enforced the Board's order against the company (A. 23-27). It remanded the case to the Board, however, for reconsideration of the union's request for additional remedies,³ in light of the court's recent decision in *Tiidee*.⁴ In that case, the court had remanded to the Board for further consideration a union's request for similar extraordinary remedies where the company's "refusal to bargain was a clear and flagrant violation of the law" and "its objections to the election were patently frivolous" (426 F. 2d at 1248).

³ The union requested the mailing of notices to employees; either a company-wide bargaining order or a shifting of the burden of proof in future cases to require Heck's to show good faith in rejecting union cards; injunctions under Section 10(j) of the Act; greater union access to employees; compensation to employees for collective bargaining benefits lost by delay; and reimbursement of union expenses incurred to overcome the effects of the company's unlawful refusal to bargain (A. 26, n. 7).

⁴ *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. National Labor Relations Board (Tiidee Products, Inc.)*, 426 F. 2d 1243 (C.A. D.C.), certiorari denied, 400 U.S. 950.

B. THE BOARD'S SUPPLEMENTAL DECISION

On remand, the Board amended its original order by granting some of the additional remedies requested by the union. It directed the company to mail notices of the Board's amended order to the homes of all employees at each of the company's locations; to provide the union, for a period of one year, with reasonable access to plant bulletin boards at all company locations for the posting of union notices, bulletins, and other organizational literature; and to furnish the union with a list of the names and addresses of all company employees at all store locations, to be kept current for a period of one year (Pet. App. 41A-42A).

The Board denied the further relief sought by the union, including its request that it be reimbursed for organizational costs and litigation expenses incurred by reason of Heck's unlawful conduct (Pet. App. 38A-39A).⁵ Respecting the latter, the Board was not "unmindful of the probability that the Charging

⁵ The Board also denied the union's request for a company-wide bargaining order, because the union had never claimed that it represented a majority of all Heck's employees. "Although the Respondent's unfair labor practices have been widespread, aggravated, and pervasive, they have not in our opinion been so widespread, pervasive, or aggravated as to warrant such extraordinary relief" (Pet. App. 34A). The Board denied the union's additional request that the employees be made whole for loss of collective-bargaining benefits. The Board stated that, even if it possessed the authority to grant such relief, this would not be an appropriate case in which to exercise it; unlike the situation in *Tiidee, supra*, where the refusal to bargain rested on "patently frivolous" issues, the refusal here rested on "debatable" issues (Pet. App. 36A-37A).

Party has spent more money on organizational costs and attorney's fees than it would have spent had the Respondent not refused to bargain" (Pet. App. 38A). It concluded, however, that it would not "effectuate the policies of the Act to require reimbursement with respect to such costs in the circumstances here" (*ibid.*).

The Board explained that the appropriateness of these reimbursement requests must be considered in the light of "the role of a charging party under the statutory scheme," and the basic principles that "Board orders must be remedial not punitive"* and that "collateral losses are not considered in framing a reimbursement order"' (Pet. App. 38A-39A). The Board added (Pet. App. 39A):

[T]he statutory scheme involves an interblending of public and private interests, and the participation of a charging party in the proceedings, before the Board and in the courts, can serve a public as well as its own private interests. Nonetheless, it is the Board which has been given primary initial responsibility to determine and protect the public interest in the elimination of obstructions to commerce resulting from labor disputes. Such protection of the public interest as may result from the charging party's participation in litigation must be regarded, we believe, as incidental to its efforts to protect its own private interests. Given this statutory framework, we conclude that the pub-

* Citing *Republic Steel Corp. v. National Labor Relations Board*, 311 U.S. 7, 11-12.

' Citing *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 364.

lic interest in allowing the Charging Party to recover the costs of its participation in this litigation does not override the general and well-established principle that litigation expenses are ordinarily not recoverable.*

C. THE SUPPLEMENTAL DECISION OF THE COURT OF APPEALS

The court of appeals enforced the Board's amended order and agreed in part with the Board's rejection of the union's other requests for extraordinary relief. It concluded, however, that reimbursement of organizational costs and litigation expenses would be appropriate in the circumstances of this case. Rather than remanding the case for further consideration of those remedies in light of its opinion, the court enlarged the Board's order to include such reimbursement and remanded solely for a compliance-stage determination of the amounts involved (Pet. App. 17A, 21A).

The court rested its decision with respect to reimbursement on its reading of the Board's supplemental decision in *Tiidee* (A. 28-42), which was issued subsequent to the Board's supplemental decision in this case.⁹ As the court viewed it, the Board in *Tiidee* retreated from its rationale in the present case by

* Citing *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717.

⁹ The *Tiidee* case is again pending on petition for review in the Court of Appeals for the District of Columbia Circuit, Nos. 72-1080, *et al.*, argued September 24, 1973.

ordering reimbursement of a union's litigation expenses by an employer who interposed patently frivolous defenses to an unfair labor practices complaint. Although the Board had never suggested that Heck's defenses in this case were insubstantial, the court reasoned that "the considerations which motivated the Board to give this enlarged relief in *Tiidee* are also operative here" (Pet. App. 9A-10A). The court stated (*id.* at 10A):

It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board. We hold that the case before us is an appropriate one for according such relief.

Similarly, the court thought that *Tiidee* signaled a shift in the Board's position with respect to reimbursement of excess organizational costs (Pet. App. 11A). The court attached controlling significance to the fact that the Board in *Tiidee*, while refusing to order such reimbursement, found it sufficient to observe that there was "no nexus between Respondent's unlawful conduct * * * and the Union's preelection organizational expenses" (A. 35). The court reasoned that, since the Board acknowledged the probability of such a nexus in the present case, "we think that provision for such costs should have been included in the remedies fashioned by the Board on remand" (Pet. App. 11A).

SUMMARY OF ARGUMENT

I

"In fashioning its remedies [under the Act] * * * the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575, 612, n. 32. Thus, the Board's choice of remedy may not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U.S. 533, 540. These principles apply whether the reviewing court is asked to limit a Board order or, as here, to broaden the Board's remedial provisions. In either case, the controlling consideration is that Congress has left it to the agency's discretion to determine what relief is necessary to cure the violations found, and that discretion comprehends deciding not only what is necessary but also what is unnecessary.

II

The Board's decision not to award litigation and organizational expenses occasioned by the company's unfair labor practices was a reasonable exercise of the Board's broad remedial power. By rejecting the Board's judgment that such remedies were not warranted here, the court below exceeded its reviewing authority.

A. The structure of the Act places primary responsibility for enforcing its provisions on the Board; the participation of the charging party in Board litigation is essentially directed to protecting its own interests. In these circumstances, the Board, in the exercise of its broad discretion to fashion appropriate remedies for unfair labor practices, reasonably concluded that counsel fees should not be awarded in this case. Its determination is consistent with the general rule of American law that "attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor" (*Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717).

Contrary to the view of the court below, the Board's reliance on this reasoning in the present case was not undercut by its subsequent decision in the *Tiidee* case (A. 28-42). In *Tiidee* the Board ordered reimbursement of litigation expenses where the respondent's defenses to the unfair labor practice charges were "patently frivolous" (A. 34-35). Frivolous litigation clogs the already crowded Board and court dockets, thereby preventing the expeditious handling of meritorious cases, and no legitimate private interest is served by permitting such litigation to be freely maintained.

But where the respondent, though charged with serious misconduct, tenders a plausible and substantial defense, as did the employer in this case, the public interest in uncrowded Board and court dockets and the private interest of the charging party collide with

the right of the respondent to obtain an adjudication of the issues he presents. The Board reasonably concluded that the competing interests call for a different balance in the former situation than they do in the latter situation. Nothing in *Tiidee* supports the court of appeals' reading of that decision to require an award of litigation expenses when a party's *conduct*, despite the substantiality of his asserted defenses, is aggravated or pervasive.

B. The Board's refusal to require that respondent be reimbursed for its excess organizational expenses was predicated on the subordinate "role of the charging party" in the scheme of the Act, and the basic principles that "Board orders must be remedial not punitive" and that "collateral losses are not considered in framing a reimbursement order" (Pet. App. 39A). The court of appeals mistakenly concluded that it was inconsistent of the Board to deny organizational expenses for these reasons here while denying them in *Tiidee* on the ground that no excess costs could be attributed to the employer's unlawful conduct in that case. The present case established the general principle that excess organizational expenses are not ordinarily recoverable under the Act. In *Tiidee*, the Board found it unnecessary to consider whether an exception to that rule was warranted there, since the facts of that case showed that there were no such excess expenses.

C. Even if the court's reading of *Tiidee* were correct, it should have remanded the case to the Board for further consideration in light of that decision. By applying to this case its own version of the Board's

supposedly new remedial policy, the court improperly entered "the domain which Congress has set aside exclusively for the administrative agency" (*Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196).

ARGUMENT

I

THE COURT OF APPEALS MUST APPLY THE SAME STANDARDS IN REVIEWING A BOARD ORDER WHICH IS CHALLENGED AS INADEQUATE TO EFFECTUATE THE PURPOSES OF THE ACT AS IT APPLIES IN REVIEWING AN ORDER CHALLENGED AS GOING FURTHER THAN NECESSARY TO EFFECTUATE THOSE PURPOSES

Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), empowers the Board, upon finding that an unfair labor practice has been committed, to order the violator to cease and desist and "to take such affirmative action * * * as will effectuate the policies of [the] Act." This section "charges the Board with the task of devising remedies" to accomplish the Act's purposes. *National Labor Relations Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. "In fashioning its remedies under the broad provisions of § 10(c) * * *, the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575, 612, n. 32; see, also, *Fibreboard Paper Products Corp. v. National Labor Relations Board*, 379 U.S. 203, 216. The Board's remedy thus may not be disturbed "unless it can be shown that the order is

a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U.S. 533, 540.

This special deference to the Board's choice of a remedy is a reflection of the "fundamental principle * * * that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power Co. v. Securities & Exchange Commission*, 329 U.S. 90, 112; *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 194. Agency orders are thus subject to judicial modification only "where the remedy selected has no reasonable relation to the unlawful practices found to exist" (*Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 613), or where it constitutes "a patent abuse of discretion" (*Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411, 414). The reviewing court may decide "only whether under the pertinent statute and relevant facts, the [agency] made 'an allowable judgment in [its] choice of the remedy'" (*Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 189).

Although the Court has enunciated these principles in cases where agency orders have been challenged as going too far, there is no reason why they should not also apply where, as here, the agency's order is challenged as not going far enough. In either situation the controlling consideration is that Congress has left it to the agency's discretion to determine what

relief is necessary to cure the violations found, and that discretion comprehends deciding not only what is necessary but also what is unnecessary. Drawing the outer limits of the remedy implicates no less important policy considerations than determining what minimum affirmative steps must be taken.

Respondent does not disagree. It has conceded that "the *same* standard is applicable whether the remedy is attacked as excessive or inadequate" (Br. in Op. 15, n. 8; respondent's emphasis). Its contention is that the Board's failure to prescribe the remedies sought by respondent was an abuse of its broad remedial discretion, and that the court of appeals therefore acted properly in enlarging the Board's order. As we demonstrate below, however, the Board did not abuse its discretion. If the court of appeals had applied the proper standard of review, it would have been constrained to uphold the Board's order without modification.

II

THE COURT OF APPEALS EXCEEDED ITS REVIEWING AUTHORITY BY ENLARGING THE BOARD'S REMEDIAL ORDER TO INCLUDE AN AWARD TO THE UNION OF LITIGATION AND ORGANIZATIONAL EXPENSES

A. THE BOARD DID NOT ABUSE ITS DISCRETION IN REFUSING TO AWARD LITIGATION EXPENSES

1. *The Board reasonably determined that litigation expenses should not ordinarily be awarded as part of the remedy for unfair labor practices*

The Board, in considering the union's request for an award of litigation expenses, reasoned that under the

statutory framework the Board has the "primary initial responsibility to determine and protect the public interest in the elimination of obstructions to commerce resulting from labor disputes,"¹⁰ and that "[s]uch protection of the public interest as may result from the charging party's participation in litigation must be regarded * * * as incidental to its efforts to protect its own private interests" (Pet. App. 39A). The Board concluded that, "[g]iven this statutory framework, * * * the public interest in allowing the Charging Party to recover the costs of its participation in this litigation does not override the general and well-established principle that litigation expenses are ordinarily not recoverable" (*ibid.*).¹¹

¹⁰ "The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265.

¹¹ Under the traditional American rule, "attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, *supra*, 386 U.S. at 717; see, also, *Hall v. Cole*, 412 U.S. 1, 4.

Unlike the National Labor Relations Act, which has no such provision, some federal regulatory statutes provide for mandatory recovery of litigation costs by a successful plaintiff who has the burden of bringing suit to enforce an award of the agency. See, *e.g.*, Packers & Stockyards Act, 7 U.S.C. 210(f); Perishable Agricultural Commodities Act, as amended, 7 U.S.C. 499g(b); Railway Labor Act, as amended, 45 U.S.C. 153(p); Interstate Commerce Act, as amended, 49 U.S.C. 16(2). Other statutes permit allocating fees at the discretion of the court, based on the conduct of the parties. See, *e.g.*, Securities Act of 1933, as amended, 15 U.S.C. 77k(e). See, also, Note, *The Allocation of Attorney's Fees After Mills v. Electric Auto-lite Co.*, 38 U. Chi. L. Rev. 316, 318 (1971).

Thus, the Board, "acting upon its experience and peculiar competence, promulgated a general rule of which its order here was a particular application" (*Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 92). This general rule was properly based upon the Board's judgment that "it would not on balance effectuate the policies of the Act to require reimbursement with respect to such costs in the circumstances here" (Pet. App. 38A). As the Board correctly noted, moreover, its rule generally denying litigation expenses is consistent with the general principle applied by the courts in this country.

2. *The Board's subsequent decision in Tiidee, establishing a limited exception to the general rule where a party asserts patently frivolous defenses to a charge of unfair labor practices, does not undercut the Board's rationale in the present case*

The court below did not deny either that the Board's general rule disfavoring awards of counsel fees is reasonable or that the rule was reasonably applied in this case. It concluded, however, that the Board's supplemental decision in *Tiidee, supra*, had undercut its rationale for denying such expenses here. The court's conclusion is erroneous. *Tiidee* establishes a limited exception to the general rule enunciated in the present case; it reaffirms rather than undercuts the rationale of the decision here.

The Board found in *Tiidee* that the employer's defenses to the unfair labor practice charges were "patently frivolous" (A. 34-35); in awarding litigation expenses in that case, it carved out a limited exception

for such "frivolous litigation" (A. 34, 35). The Board stated in *Tiidee* (A. 35-36):

Normally, as the Board recently noted, litigation expenses are not recoverable by the charging party in Board proceedings even though the public interest is served when the charging party protects its private interests before the Board. [Citing the instant case.]

* * * [H]owever, * * * frivolous litigation such as this is clearly unwarranted and should be kept from the nation's already crowded court dockets, as well as our own. While we do not seek to foreclose access to the Board and courts for meritorious cases, we likewise do not want to encourage frivolous proceedings. The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available. Accordingly, in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper to order Respondent to reimburse the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of these cases * * *.

Where, as in *Tiidee*, the proffered defense to charges of unfair labor practices is frivolous, no legitimate private interest is served by permitting the defense to be freely asserted. On the other hand, where the employer, though charged with serious misconduct, tenders a plausible and substantial defense, the public interest in "uncrowded Board and court dockets" (A. 36) and the private interest of the charging party in

avoiding unnecessary litigation expenses collide with the right of the employer to obtain an adjudication of the issues he presents. "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited review." *Golden State Bottling Company v. National Labor Relations Board*, No. 72-702, decided December 5, 1973, slip op. 12, quoting from *National Labor Relations Board v. Teamsters Local 449*, 353 U.S. 87, 96.

The Board's balancing of the competing public and private interests is reasonable. It has determined that, regardless of how serious the unfair labor practice charge or how aggravated the alleged conduct, a party should not be deterred from presenting substantial defenses. When "patently frivolous" (A. 34-35) defenses are asserted, however, the purposes of the Act are furthered by awarding litigation expenses "in order to discourage future frivolous litigation" (A. 36) and thereby to help maintain "speedy access" (A. 35-36) to the Board.¹²

¹² The distinction between frivolous and non-frivolous litigation has long been the basis of attorneys' fees awards by the federal district courts as well. It is settled that a district court may award counsel fees "where an unfounded action or defense is brought or maintained in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 *Moore's Federal Practice*, ¶ 54.77[2], p. 1709 (2d ed., 1972); see, also, *Newman v. Piggie Park Enterprises, Inc.* 390 U.S. 400, 402, n. 4; *Hall v. Cole*, 412 U.S. 1, 5.

The Court of Appeals for the First Circuit has awarded attorneys' fees under Rule 38 of the Federal Rules of Appellate

Thus, nothing in the Board's *Tiidee* decision undercuts its rationale for denying litigation expenses in the present case. Heck's defense to the refusal-to-bargain charge was that it entertained a good faith doubt about the union's majority status. Though both the Trial Examiner and the Board ultimately determined that the union in fact represented a majority of the store employees (A. 13-16; Op. App. 2a), the Board reasonably concluded that Heck's contentions, unlike the "patently frivolous" defenses of the employer in *Tiidee*, were "debatable" and not "clearly meritless on their face" (Pet. App. 37A).¹³ Heck's "introduced testimony which if fully credited and given its broadest possible sweep, would have resulted in the rejection

Continued

Procedure where a party's defenses to a Board enforcement proceeding were wholly without merit. See *National Labor Relations Board v. Smith & Wesson*, 424 F. 2d 1072, 1073; *National Labor Relations Board v. United Shoe Machinery Corp.*, 445 F. 2d 633, 635. Cf. *National Labor Relations Board v. Sauk Valley Mfg. Co.*, C.A. 9, No. 72-1569, decided October 29, 1973, slip op. 9. Rule 38 provides: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

¹³ Though these statements appear in the section of the Board's decision dealing with the union's request for reimbursement for the loss of collective-bargaining benefits (Pet. App. 36A-37A; see note 5, *supra*), the Board's conclusions there about the substantiality of Heck's defenses nonetheless bear on the question whether *Tiidee* requires a different result with respect to counsel fees in this case. The Board had no reason here to reiterate in the section of its decision on litigation expenses that Heck's claims were debatable, since it was not then addressing possible exceptions to its general rule denying such expenses. It did, however, rest its decision of this case on "the circumstances here" (Pet. App. 38A); it concluded that the Act's purposes would not be served by allowing the union its counsel fees "in this litigation" (Pet. App. 39A).

tion of sufficient cards to have vitiated the Union's majority claim" (*ibid.*).¹⁴

The court of appeals expressed no doubt about the propriety of the Board's distinction between frivolous and non-frivolous litigation;¹⁵ nor did it question the Board's conclusion that Heck's defenses were substantial. It apparently construed the *Tiidee* decision, however, to require an award of litigation expenses

¹⁴ Similarly, although the Board ultimately concluded that the evidence supported an inference that Heck's had no good faith doubt of the union's majority status (and therefore that a Section 8(a)(5) violation had been established) (Op. App. 2a-5a), the substantiality of Heck's contention that its doubt was in good faith is demonstrated by the Trial Examiner's finding that the evidence did not show an 8(a)(5) violation (A. 17). The Trial Examiner was "particularly influenced by the fact that in prior cases the Company's challenge to card majorities proved well-founded" (*ibid.*). He stated that, in view of Heck's prior successes in disputing the union's majority status, its "reluctance to recognize the Union pursuant to the latter's claim of a majority based on authorization cards is certainly understandable, to say the least" (*ibid.*).

Heck's also presented substantial factual defenses to the Section 8(a)(1) charges of improperly threatening and polling its employees. Some of those defenses were sustained by the Trial Examiner (A. 11-12); others were rejected on the basis of the Examiner's resolution of the "conflicts in the testimony" (A. 8).

¹⁵ The court below has recognized in other cases that extraordinary remedies for unfair labor practices may be applicable to violators who present frivolous defenses but not to those whose contentions are debatable. See *Retail Clerks Union Local 1401 v. National Labor Relations Board* (Zinke's Foods, Inc.), 463 F. 2d 316, 325; *Southwest Regional Joint Board, Amalgamated Clothing Workers v. National Labor Relations Board* (Levi Strauss & Co.), 441 F. 2d 1027, 1036; *United Steelworkers v. National Labor Relations Board* (Quality Rubber Mfg. Co.), 430 F.2d 519, 521-522.

whenever a violator's *conduct*, regardless of the merit of its defenses, is "clearly aggravated and pervasive" (Pet. App. 10A). The court stated, referring to *Tiidee* (*ibid.*):

It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board.

As we have shown, however, the standard the Board announced in *Tiidee* was based not on a violator's conduct but on the substantiality of the defenses he asserts in Board litigation. The purpose of the award of litigation costs, as stated by the Board, was "to discourage future frivolous *litigation*" (A. 36; emphasis added). There is nothing in the *Tiidee* decision that supports the court of appeals' inference that an employer like Heck's, whose unfair labor practices are determined to be "aggravated and pervasive" (Pet. App. 29A) when viewed in terms of its past antiunion activities, but whose litigating position in the particular case is substantial, must reimburse the union's litigation costs.¹⁶

¹⁶ Subsequent to its supplemental decisions in this case and in *Tiidee*, the Board decided another case involving *Tiidee Products, Inc.* (196 NLRB No. 27, decided April 6, 1972). It found there that the company, subsequent to its unlawful conduct in the earlier case, engaged in further unlawful refusals to bargain and committed other violations of the Act. The Board found that the refusals to bargain were "so inextricably intertwined" with the first "refusal on frivolous grounds to bargain with the Union as to require the conclusion that it was part of the same pattern of patently frivolous litigation for the same unlawful object" (*id.* at 3).

The court's conclusion (Pet. App. 9A) that the Board in *Tiidee* had "departed from the rationale upon which its refusal of litigation expenses in this case is based" is thus unwarranted. The court, in effect, undertook to balance "the conflicting legitimate interests" in uncrowded dockets on the one hand and in the freedom to assert substantial defenses on the other hand in a manner different from that chosen by the Board. That balancing function, however, is properly committed to the Board, not the courts. See *Golden State Bottling Co. v. National Labor Relations Board*, *supra*, slip op. at 12; *National Labor Relations Board v. Teamsters Local 449*, *supra*, 353 U.S. at 96.

3. *The Board's decision rests on its judgment of how best to effectuate the purposes of the Act; not on any misconception of the judicially-developed exceptions to the rule disfavoring awards of attorneys' fees*

Respondent argues that the Board committed "an error of law" (Br. in Op. 18) in misconceiving the traditional American rule that "attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor" (*Fleischmann Distilling Corp. v. Maier Brewing Co.*, *supra*, 386 U.S. at 717). In respondent's view, the exceptions to that rule do "not distinguish between bad faith violations and bad faith defenses"; they require an award of "attorney's fees as well 'where the behavior of a liti-

The Board's order directed the payment of litigation expenses with respect to the later refusals to bargain as well as the other violations, because "we are unable to allocate the particular costs of litigating the refusal to bargain as distinguished from the other unfair labor practices" (*id.* at 4, n. 7). The decision is thus in accord with the principles developed in the Board's earlier decisions in the present case and in *Tiidee*.

gant has reflected a willful and persistent * * * defiance of the law' * * * as where the proffered defenses are frivolous" (Br. in Op. 18).

But even if the federal courts, in the exercise of their equitable powers, define the "bad faith" exception as respondent contends—awarding attorneys' fees in cases of bad faith violations as well as bad faith defenses"—it does not follow that the Board, in the exercise of its remedial authority under Section 10(c) of the National Labor Relations Act, must do likewise. "In evolving standards of fairness and equity, the [Board] is not bound by settled judicial precedents." *Securities & Exchange Commission v. Chenery Corp.*, *supra*, 318 U.S. at 89. As we have shown (pp. 15-21, *supra*), the Board's conclusion not to award litigation

¹⁷ Contrary to respondent's assertion, the cases it cites (Br. in Op. 18) do not establish that this "bad faith" exception applies where, as in this case, the losing party has not acted in bad faith in the litigation itself. In *Local No. 149, United Auto Workers v. American Brake Shoe Co.*, 298 F. 2d 212, 216 (C.A. 4), the court held that, in an action to compel compliance with an arbitration award, attorneys' fees will be awarded only where the losing party, "without justification, refuses to abide by the award * * *." The court denied the request for such fees because "there was justification for the litigation here involved." Similarly, in *Brewer v. School Board of City of Norfolk, Virginia*, 456 F. 2d 943 (C.A. 4), the court, while awarding attorneys' fees in a school desegregation suit on the theory that it benefited the entire class of students (*id.* at 951), declined to rest its award on the theory that the litigant's behavior "has reflected a wilful and persistent 'defiance of the law'" (*id.* at 949). The court ruled that the "bad faith" exception is inapplicable "where litigation was pursued on a matter as to which prior decisions left a lingering doubt" (*ibid.*), and it found such doubt there (*id.* at 951).

In *Vaughan v. Atkinson*, 369 U.S. 527 (a suit in admiralty to recover maintenance and cure, and damages for failure to pay it), this Court found in effect that the shipowners—

expenses except where the litigation is frivolous is based upon a consideration of the structure and policies of the Act and rests on rational grounds.

The Board's reference to "the general and well-established principle that litigation expenses are ordinarily not recoverable" (Pet. App. 39A) does not imply an exclusive reliance on the substantial body of judicial decisions concerning the award of attorneys' fees. The Board did not "explicitly disavow * * * any purpose of going beyond [the standards] which the courts had theretofore recognized" (*Chenery Corp., supra*, 318 U.S. at 89). It merely invoked, in support of its own balancing of the conflicting public and private interests under the Act, the policy underlying the general American rule disfavoring awards of counsel fees.

who were "callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it"—presented no substantial defense on the question of their liability for maintenance. The Court stated that "libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old" (*id.* at 530-531). The Court held that, in these circumstances, counsel fees could be recovered as an element of damages for failure to furnish maintenance and cure.

Siegel v. William E. Bookhultz & Sons, Inc., 419 F. 2d 720 (C.A.D.C.), involved an application of the established principle that, in suits to enforce an insurer's duty to defend, "[t]he damages recoverable * * * include not only the adjudicated or negotiated amount of the claim and the insured's expenses in resisting it but also any additional loss legally traceable to the breach" (*id.* at 723; footnotes omitted and emphasis added). Rather than establishing a "fixed rule" (*id.* at 722) that counsel fees are always available in such suits as damages "legally traceable to the breach," the court held that, where the insurer's conduct in refusing to defend is especially oppressive, "overriding considerations of justice" (*ibid.*) permit an award of attorneys' fees under the "legally traceable" standard.

B. THE BOARD DID NOT ABUSE ITS DISCRETION IN REFUSING TO
 * AWARD EXCESS ORGANIZATIONAL EXPENSES

The Board denied the union's request for reimbursement of its excess organizational expenses allegedly incurred as a consequence of Heck's unlawful conduct. Though it acknowledged that there may have been some additional costs attributable to Heck's refusal to bargain (Pet. App. 38A), it concluded that considerations of the "role of a charging party under the statutory scheme" and "the basic principles * * * that Board orders must be remedial not punitive, and collateral losses are not considered in framing a reimbursement order" (Pet. App. 39A), made such an order inappropriate. "[I]n the circumstances here"—which included the presentation by Heck's of substantial factual defenses to the 8(a)(1) and 8(a)(5) charges—"[i]n our opinion it would not on balance effectuate the policies of the Act to require reimbursement" (Pet. App. 38A).

The court of appeals did not deny that these would be valid reasons for declining to award excess organizational expenses. As in the case of litigation costs, however, it concluded that "the Board, upon remand in *Tiidee*, has shifted its ground with respect to organizational costs" (Pet. App. 11A). Here, too, the court misinterpreted *Tiidee*.

In *Tiidee*, the Board denied organizational expenses on the ground that there were no excess costs attributable to the employer's unlawful conduct (A. 34-35). That determination is not inconsistent with the Board's determination here that, despite the probability that there were some excess organizational

costs, the Act's policy would not be furthered by ordering reimbursement in this case. The Board here enunciated the general principle that excess organizational expenses are not ordinarily recoverable under the Act. In *Tiidee*, the Board merely held, in effect, that it was unnecessary to consider whether an exception to that rule was warranted in that case, since the union had not in fact incurred any excess organizational expenses.

There is no basis for the court's inference (Pet. App. 11A) that, by deciding *Tiidee* on the ground that no excess organizational costs had been incurred, the Board had abandoned the general principle that such costs are not ordinarily recoverable. By an extension of the court of appeals' reasoning, where this Court determines that a person lacks standing to assert a claimed violation of the Fourth Amendment (e.g., *Brown v. United States*, 411 U.S. 223; *Alderman v. United States*, 394 U.S. 165), there is an implication that his claim would have been sustained had he been permitted to assert it. In neither case can such an inference fairly be drawn. That the union had incurred no excess organizational costs does not mean that, if it had incurred costs, it could have recovered them.

C. IN ANY EVENT, THE COURT OF APPEALS, BY AWARDED LITIGATION AND ORGANIZATIONAL EXPENSES ITSELF RATHER THAN REMANDING THE CASE TO THE BOARD, IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE BOARD ON THE APPROPRIATE REMEDY FOR THE UNFAIR LABOR PRACTICES IN THIS CASE

Even if the court of appeals' reading of *Tiidee* were correct and the Board has in fact changed its policy

with respect to awards of litigation and organizational expenses, the court below should not have undertaken to apply its version of that changed policy to the case before it. Rather, it should have remanded the case to the Board to give it an opportunity to consider whether and in what manner the change should affect the remedy in this case.¹⁸ "[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20.¹⁹

The court of appeals thus exceeded its reviewing authority, because it improperly substituted its judgment of the appropriate remedy in this case for that of the Board. "For reviewing courts to substitute * * *

¹⁸ On further remand, the Board would have had an opportunity to consider, for example, whether the *Tiidee* ruling—if it in fact represented a change in policy—should be applied retroactively or, like some decisions of this Court that are designed to deter unlawful conduct, only prospectively.

¹⁹ Respondent contends (Br. in Op. 12, 19) that a remand was not necessary, because the Board had already distinguished the two cases in its opinion in *Tiidee* and because the Board did not respond to respondent's motion in the court of appeals to lodge the *Tiidee* decision. But the discussion in the *Tiidee* decision, designed to show that the case was different from the present one, did not anticipate a holding by the court that the rationale of the Board's decision in this case had been undercut. The Board should have been given an opportunity to consider the appropriate remedial course in light of that holding.

The Board did not respond to respondent's pre-argument motion to lodge the *Tiidee* decision, because it had no reason to oppose that motion. Its position on respondent's inferences from the decision, argued in its memorandum supporting the motion to lodge, were made fully known to the court of appeals at oral argument.

their [own] discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.'" *National Labor Relations Board v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 444, quoting from *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196.

CONCLUSION

The judgment of the court below should be reversed insofar as it enlarges the Board's order by awarding litigation and organizational expenses.

Respectfully submitted.

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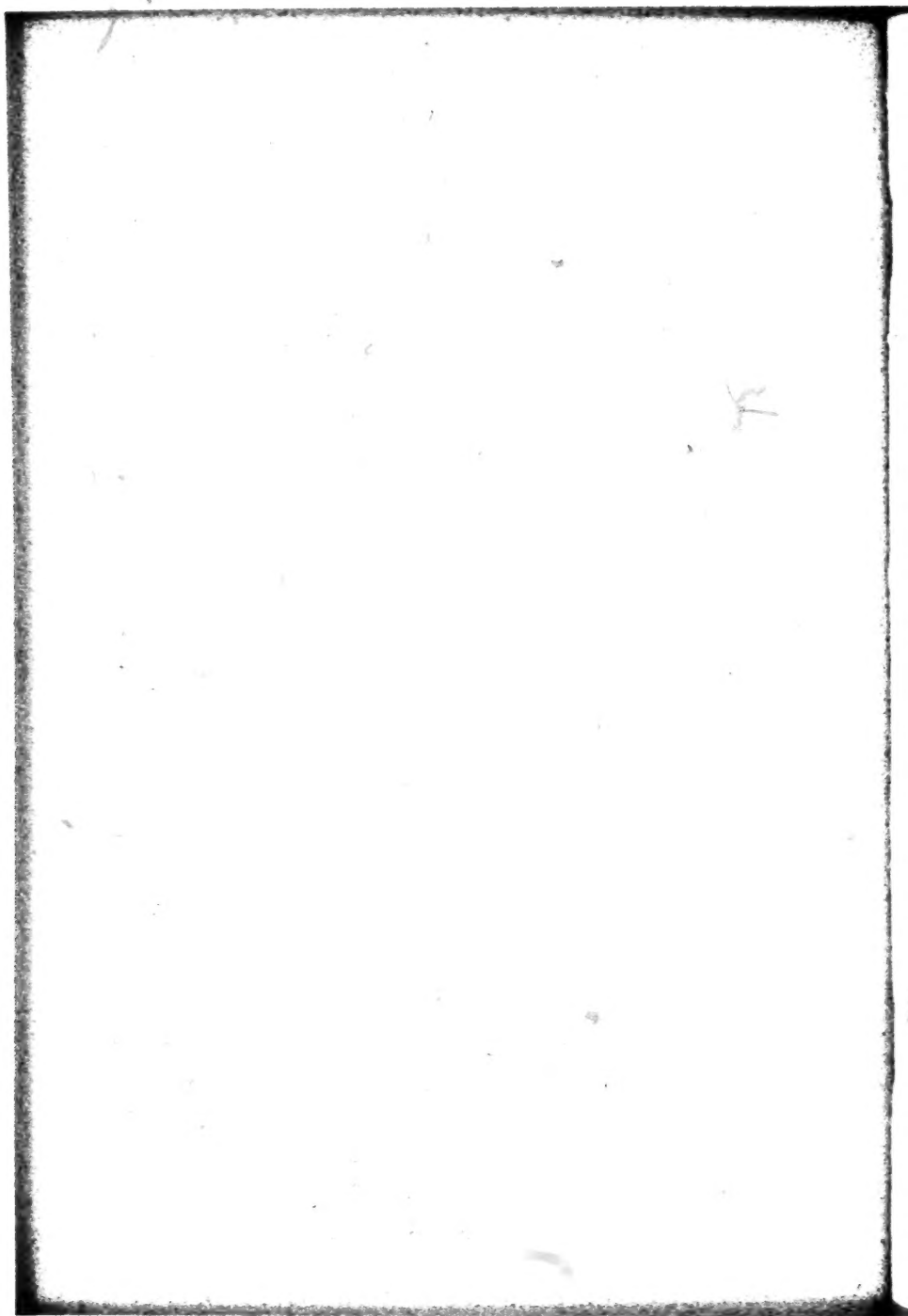
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JANUARY 1974.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

FOOD STORE EMPLOYEES UNION, LOCAL 347,
AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN
OF NORTH AMERICA, AFL-CIO, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

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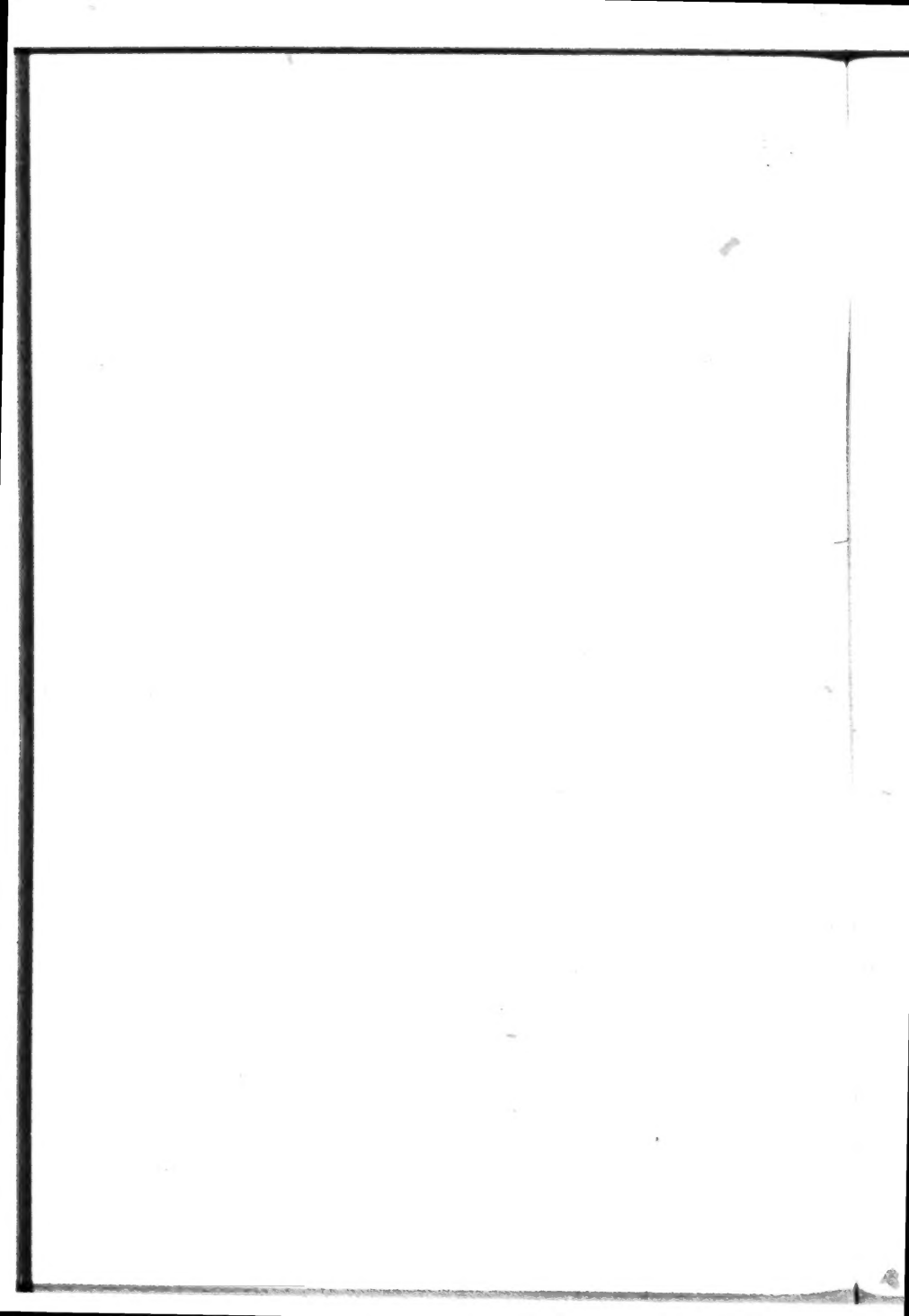
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IN THE
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v.

FOOD STORE EMPLOYEES UNION, LOCAL 347,
AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN
OF NORTH AMERICA, AFL-CIO, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT

OPINIONS BELOW

The citations to the opinions below are adequately set forth in the Board's brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Board's brief.

QUESTION PRESENTED

Whether the court of appeals exceeded its authority in reversing as arbitrary, and therefore unwarranted in law, the Board's refusal to order certain remedies in this case.

STATUTES INVOLVED

Section 10 of the National Labor Relations Act, 61 Stat. 146, 73 Stat. 544, as amended, 29 U.S.C. § 160, provides in part:

“(f) Any person aggrieved by a final order of the Board * * * denying in whole or in part the relief sought may obtain a review of such order * * * in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * * Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction * * * to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board * * *.”

Section 706 of the Administrative Procedure Act, 60 Stat. 243, 80 Stat. 393, 5 U.S.C. § 706, provides in part:

“... The reviewing court shall— . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . .”

STATEMENT

A. The Board's Initial Decision

In its first decision and order in this case, entered September 24, 1968, the Board found that, in 1967, Heck's, Inc., had violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by threatening to close its Clarksburg, West Virginia, retail store if its employees organized and by coercively interrogating and poll-

ing them about the Union (Op. App. 2a).¹ The Board also found that Heck's refusal to bargain was in bad faith and therefore violated Section 8(a)(5).

The Board explained (Op. App. 3a-5a):

"... Respondent engaged in extensive violations of the Act which directly involved nearly every employee in the unit. We note further that the Board has recently found that this Respondent engaged in a pattern of similar unfair labor practices at its other stores in West Virginia and Kentucky, and that the Respondent has a labor policy in all its stores that is opposed to the policies of the Act. Earlier Board decisions involving the Respondent's operations show that President Haddad and Vice President Darnall, who together control the labor policy at all the Respondent's stores, have both actively participated at a number of stores in conduct found to be unlawful. Both have repeated their unlawful conduct in the present cases. Such flagrant repetition of conduct previously found unlawful shows a complete disregard by the Respondent of its obligations under the Act.

* * *

In the instant cases, the Respondent's refusal to grant recognition, followed by its extensive violations of the Act and its interference with the employees' free choice in the Board-conducted election, clearly evidence its unlawful motive and justify an interference [sic] of bad faith. Consequently, we find, contrary to the Trial Examiner, that the General Counsel has established that the Respondent's refusal to recognize the Union was not based on a good-faith doubt of the Union's majority status. We find further that its refusal

¹ "Op. App." refers to the appendix to the brief in opposition.

"Pet. App." refers to the appendix to the petition. "A." refers to the separate appendix to the briefs.

was for the purpose of utilizing the preelection period to undermine the Union majority, and that the Respondent thereby made it impossible to hold a free and fair election. Accordingly, we find that the Respondent refused to bargain with the Union, in violation of Section 8(a)(5) and Section 8(a)(1) of the Act.

In any event the Respondent's extensive Section 8(a)(1) violations, on which it embarked at about the time the Union attained its majority status and which made a free and fair election impossible, justify an order requiring the Respondent to bargain with the Union upon request as an appropriate remedy for the Respondent's 8(a)(1) violations."

The Board ordered remedies traditional in routine Section 8(a)(1) and (5) cases, but denied the Union's request for additional relief.

B. The Remand

On May 4, 1970, the court of appeals granted the Board's petition for enforcement of its order (433 F.2d 541), but, on the Union's petition for review, remanded for further consideration of the adequacy of the remedies (433 F.2d at 543). The court explained (*ibid.*):

"Since 1964 Heck's has been the object of nine other unfair labor practice proceedings which show, in the Board's words, 'a labor policy in all its stores that is opposed to the policies of the Act.'" [Footnote omitted].

"The Board's findings of bad faith and flagrant misconduct lead us to remand this case to the Board for reconsideration, in the light of our recent decision in *Tiidee Products [International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB]*, 426 F.2d 1243, cert. denied

400 U.S. 950], of the Union's request for further relief.⁷ "

⁷ The Union requested a broad range of further relief: . . . [including] Union expenses expended to overcome the effects of the Company's unlawful refusal to bargain."

In its cited *Tiidee Products* case, the court of appeals, finding that the company's "refusal to bargain was a clear and flagrant violation of the law" (426 F.2d at 1248), had held that in such cases "[e]ffective redress for statutory wrong should both compensate the party wronged and withhold from the wrongdoer the fruits of its violation." It had further held that the Board was empowered to "do something [more than it had traditionally done] to advance the policies of the Act, and prevent the employer from having a free ride during the period of litigation." 426 F.2d at 1251. Among other things the court held the Board could do was assess against respondent the "costs of litigation." *Ibid.*, note 11. The court, therefore, remanded to the Board for reconsideration the various requests of the union for additional relief, *e.g.*, to compensate the employees for loss of collective-bargaining benefits during the period of the employer's bad faith refusal to bargain,² and "such lesser, alternative remedies as an award to the Union for excess organization costs caused by the Company's behavior, or for the costs of having to litigate a frivolous case, or for a combination of these" (426 F.2d at 1253, n.15).

C. The Board's Supplemental Decision

The Board accepted the remand in this case, and all parties filed briefs with the Board. The Board issued

² Hereinafter sometimes referred to as the "make-whole remedy."

its supplemental decision, 191 NLRB 886, on July 1, 1971, before handing down its decision on remand in *Tiidee*.

In preliminary discussion, the Board stated (Pet. App. 29A):

“Viewed in isolation, the Respondent’s conduct as found in this case, although serious, is not so aggravated or pervasive as to warrant additional special remedies. However, as we have had occasion to point out, in a somewhat different context with respect to this Respondent, it is by now clear that Respondent’s conduct here is but part of a pattern of unlawful antiunion conduct engaged in by Respondent’s top officials throughout Respondent’s entire operations for the purpose of denying to all of its employees the exercise of those rights guaranteed the employees by Section 7 of the Act. In such circumstances conduct at a single store such as this can no longer be viewed in isolation; Respondent’s conduct must, rather, be viewed in its total context. As so viewed, Respondent’s unfair labor practices are clearly aggravated and pervasive. It is, accordingly, against this background of companywide aggravated and pervasive unfair labor practices that we consider the Union’s request for additional relief in this particular case.” [Footnote omitted.]

The Board concluded that it was appropriate to grant certain additional non-monetary remedies, but refused to approve the Union’s requests, *inter alia*, that employees be made whole for loss of collective-bargaining benefits and for a company-wide bargaining order without proof of majority in individual store units. The Board also refused to order reimbursement of excess organizational costs and expenses of litigation engendered by Heck’s illegal conduct.

As to the latter, the Board found that the Company's "aggravated and pervasive" unfair labor practices had imposed on the Union excess organizational expenses and costs of litigation.³ But it refused to order reimbursement for specified reasons (Pet. App. 38A-39A):

"To determine the appropriateness of these reimbursement requests, we must, we believe, consider the role of a charging party under the statutory scheme in the light of the basic principles, that Board orders must be remedial not punitive,¹⁶ and collateral losses are not considered in framing a reimbursement order.¹⁷ As the Supreme Court has stated,¹⁸ the statutory scheme involves an interblending of public and private interests, and the participation of a charging party in the proceedings, before the Board and in the courts, can serve a public as well as its own private interests. Nonetheless, it is the Board which has been given primary initial responsibility to determine and protect the public interest in the elimination of obstructions to commerce resulting from labor disputes. Such protection of the public interest as may result from the charging party's participation in litigation must be regarded, we believe, as incidental to its efforts to protect its own private interests. Given this statutory framework, we concluded that the public interest in allowing the Charging Party to recover the costs of its partici-

¹⁶ *Republic Steel Corporation v. N.L.R.B.*, 311 U.S. 7, 11-12.

¹⁷ *Gullett Gin Company, Inc. v. N.L.R.B.*, 340 U.S. 361, 364.

¹⁸ *Intl. Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 283 v. Scofield*, 382 U.S. 205, 217, *et seq.*

³ "[W]e are not unmindful of the probability that the Charging Party has spent more money on organizational costs and attorney's fees than it would have spent had the Respondent not refused to bargain." (Pet. App. 38A.)

pation in this litigation does not override the general and well-established principle that litigation expenses are ordinarily not recoverable.¹⁹

¹⁹ *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714-717. Compare *Neuman v. Piggie Park Enterprises*, 390 U.S. 400, where litigation expenses were awarded under a statute (42 U.S.C. 2000a *et seq.*) which places greater reliance on private action for the vindication of public rights."

On July 9, 1971, the Union again petitioned for review.

D. The Board's Supplemental Decision in *Tiidee*

On January 24, 1972, after the instant case had been fully briefed below, but before oral argument, the Board issued its supplemental decision and order in *Tiidee Products*, 194 NLRB 1234 (A. 28-37). While the Board concluded in that decision that a make-whole order was not appropriate, it granted additional relief, both monetary and nonmonetary, explaining:

"... the Board believes that the alternative remedies provided hereinafter will undo some of the baneful effects pointed out by the court as having resulted from Respondent's 'clear and flagrant violation of the law.' They will, for one, aid the Union in rebuilding its strength so that it may bargain effectively with Respondent. Also, by requiring Respondent to pay some of the Board and union litigation costs occasioned by its misconduct, similar 'brazen' refusals to bargain will be discouraged." [Footnote omitted]. (A. 33.)

It characterized the proffered rationale for reimbursement of excessive organizing costs and litigation expenses as follows (A. 34):

"The Union asserts that an award to it of organizational expenses, litigation costs and expenses, and lost initiation fees and dues would meet another of the court of appeals' objections to

the Board's order; *viz.*, that our traditional remedy rewarded Respondent's delaying tactics and increased the likelihood that similar frivolous litigation would clog future Board and court calendars."

It denied reimbursement of organizing expenses because (A.34-35):

"It is clear that the Union incurred no extraordinary organizational expenses because of Respondent's patently frivolous objection to the election and subsequent refusal to bargain. Despite certain already remedied preelection unlawful Respondent conduct, the Union was selected by the employees after a 2-month campaign at the first election held. *We find, therefore, no nexus between Respondent's unlawful conduct here under examination and the Union's preelection organizational expenses and, accordingly, we shall not award them to the Union.*" (Emphasis added.)

With respect to the Union's claim for litigation expenses, the Board stated (A.35-36):

"We find merit, however, in the Union's request that it be reimbursed for certain litigation costs and expenses. Normally, as the Board recently noted, litigation expenses are not recoverable by the charging party in Board proceedings even though the public interest is served when the charging party protects its private interests before the Board.¹⁶

We agree with the court, however, that frivolous litigation such as this is clearly unwarranted and should be kept from the nation's already crowded court dockets, as well as our own. While we do not seek to foreclose access to the Board and courts for meritorious cases, we likewise do not want to encourage frivolous proceedings. The policy of the Act to insure industrial peace through collective

¹⁶ *Heck's, Inc., supra*, fn. 20.

bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available. Accordingly, in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper to order Respondent to reimburse the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of these cases Accordingly, we shall order Respondent to pay to the Board and the Union the above-mentioned litigation costs and expenses.¹⁷

¹⁷ See also Rule 38, Federal Rules of Appellate Procedure. Cf. *Sprague v. Ticonic National Bank*, 307 U.S. 161, 166; *Schauffler v. United Association of Journeymen*, 246 F.2d 867 (C.A. 3, 1957)."

Thereupon, the Union moved to lodge the Board's *Tiidee* decision with the court below (A. 43-45), arguing, in a supporting memorandum, that the rationale of that decision undermined and invalidated the Board's denial of litigation and organizing expenses in this case. The Board filed no response to that motion, and at no time prior to, or at, oral argument of this case did the Board request that this case be remanded for reconsideration in the light of its supplemental decision in *Tiidee*.

E. The Supplemental Decision of the Court of Appeals

The court below issued its supplemental decision herein on March 21, 1973. It agreed that in the supplemental decision in *Tiidee* " . . . the Board itself has subsequently departed from the rationale upon which its refusal of litigation expenses in this case is based" (Pet. App. 9A). It explained (Pet. App. 9A-10A):

"We think the considerations which motivated the Board to give this enlarged relief in *Tiidee* are also

operative here. Although the Board in its Supplemental Decision in this case has nowhere characterized the litigation as frivolous, it has used the language of 'clearly aggravated and pervasive' misconduct; and in its original opinion it questioned Heck's good faith because of its 'flagrant repetition of conduct previously found unlawful' at other Heck's stores. It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board. We hold that the case before us is an appropriate one for according such relief."

Similarly, as to organizational expenses, the court held (Pet. App. 11A):

"As in the case of litigation expenses, the Board, upon remand in *Tiidee*, has shifted its ground with respect to organizational costs. In its Supplemental Decision in *Tiidee*, the Board did not allow the claim for excess organizational expenses, but it justified that action solely on the ground that '... the Union was selected by the employees after a 2-month campaign at the first election held;' and, because of this circumstance, the Board found '... no nexus between Respondent's unlawful conduct here under examination and the Union's pre-election organizational expenses. ...' Thus, in *Tiidee* the Board appears to have denied organizational costs because it believed that, on the facts of that case, no unusual organizational costs had been incurred.

"This obviously is quite a different thing from saying that the policies of the Act forbid the allowance of such costs in cases like the one before

us, where the Board has in terms indicated its awareness of 'the probability' that costs were experienced by reason of Heck's intransigence. Under these circumstances we find nothing in the Board's Supplemental Decision which constitutes an adequate justification for the denial of extraordinary organizational costs to which the Union was exposed by reason of Heck's policy of resisting organizational efforts and refusing to bargain; and we think that provision for such costs should have been included in the remedies fashioned by the Board on remand."

SUMMARY OF ARGUMENT

I

When an agency remedial order is arbitrary, capricious, or constitutes an abuse of discretion, a reviewing court is obliged to modify it appropriately. The cited standard applies whether the order is challenged as being excessive or inadequate. Insofar as the Board asserts that the court below applied a different standard, the Board is clearly in error.

II

The court below properly held that the Board's supplemental decision in *Tiidee Products*, 194 NLRB 1234, rationally compelled modification of the remedy in this case.

A. Having held in *Tiidee Products* that the litigation expenses of a charging party should be reimbursed by employers who "frivolously" resist collective bargaining, in order to deter such offenders from cluttering Board and court dockets, the Board could not reasonably refuse a similar remedy to the Union in this case, which had been victimized by an employer found by the Board to have acted in "bad faith" and

to have engaged in "clearly aggravated and pervasive" unfair labor practices (Op. App. 4a; Pet. App. 29A). No legitimate interest, public or private, is served by distinguishing between an employer who proffers a "frivolous" defense and one who advances a "debatable" defense, when the course of conduct of the latter has clearly been actuated by a purpose of obstructing the policies and processes of the Act.

B. By abandoning, in *Tiidee Products*, the reasons professed in this case for not awarding excess organizational expenses suffered by a union at the hands of a lawless employer, and by clearly indicating in *Tiidee* that such an award is appropriate when a nexus between the extraordinary expenses and the unlawful conduct is demonstrated, the court below acted properly in awarding such relief here, where the Board had expressly noted the "probability that the Charging Party has spent more money on organizational costs and attorney's fees than it would have spent had the Respondent not refused to bargain" (Pet. App. 38A).

C. No remand was necessary. The court did not find that the Board had changed its policy, but rather that the rationale underlying the *Tiidee* gloss on this case necessarily comprehended the facts of this case. The court below had the power to decide this question of law, and it properly recognized that any attempt by the Board on remand to maintain its position that the cases were distinguishable would be an arbitrary and capricious result.

III

Even absent the Board's decision in *Tiidee Products*, the Board erred as a matter of law in refusing

to order reimbursement of the Union's litigation costs and excess organizing expenses in this case.

A. The Act obliges, not merely authorizes, the Board to grant appropriate remedial relief. In this case, the Board correctly acknowledged that, in the matter of awarding counsel fees, it should be guided by precedents forged by the courts, which have considered the question thoroughly over the years. The Board misunderstood the nature of the traditional American rule, however, and failed to give cognizance to the established exception of awarding counsel fees to a successful party whose opponent has acted in bad faith.

Despite its misapprehension of the traditional rule, the Board acknowledged that the public service rendered by a charging party is meaningful and might serve as a basis for awarding counsel fees, but finally concluded that the participation of the charging party is not sufficiently substantial, within the statutory framework, to override the misconceived "general and well-established principle that litigation expenses are ordinarily not recoverable" (Pet. App. 39A). In so demeaning the status of the charging party, the Board (1) rejected the teaching of this Court in *Auto Workers v. Scofield*, 382 U.S. 205, as to the role of the charging party in the statutory scheme; (2) failed to recognize that the charging party's participation promotes the public interest even if, *arguendo*, it is seeking to advance its own private interests; (3) ignored relevant case law supporting the encouragement of the participation by private parties in vindicating statutory policy; and (4) disregarded the factual and legal importance of the charging party to the processes of the NLRA.

B. In refusing to order reimbursement of the Union's extraordinary *organizational* expenses, engendered by the employer's flagrant misconduct, on the totally irrelevant ground of the asserted relative insignificance of participation by a charging party in *litigation*, the Board acted irrationally. Since the requested remedy is manifestly appropriate, and the Board's denial thereof was completely without rational basis, the Board erred as a matter of law in refusing to grant the remedy.

ARGUMENT

I. THE COURT BELOW APPLIED THE PROPER STANDARD IN REVIEWING THE BOARD'S ORDER

The first question said by the Board to be "presented" here is:

"Whether a remedial order of the National Labor Relations Board which is challenged by the charging party as inadequate to effectuate the purposes of the Act is entitled to the same respect by a reviewing court as an order challenged as going further than necessary to effectuate those purposes."

The Board argues that the same standard of judicial review should apply in both situations; the Union, as discussed below in Point II, agrees. But the question "presented" and the Board's brief suggest that the court below believed that a different standard was applicable to challenges based on inadequacy of the remedy; in this, the Board is clearly in error.

Nothing in the opinion below even remotely suggests that the court applied or purported to apply a different standard of appellate review to Board remedies claimed to be inadequate than to remedies at-

tacked as excessive. To the contrary, in upholding the Board's denial of other additional remedies, the court made clear its awareness and application of the appropriate standard of review.⁴ The most searching scrutiny of the court's opinion can unearth no shred of evidence that, in its treatment of litigation and organization expenses, the court applied a different standard of review than the one the court properly applied in reviewing other aspects of the remedy ordered by the Board.

Accordingly, to the extent that the Board's argument for reversal is predicated on a claim that the court below invoked a *different* and improper standard of review in treating with litigation and organization expenses, it must be rejected.

⁴ The Board's refusal to grant the Union access to employees on company property was sustained by the court below as "an exercise of judgment which we are not disposed to overturn" (Pet. App. 6A). The Board's denial of the Union's request for a company-wide bargaining order was sustained as based on "considerations [which] seem to us rational in nature and well within the range of respect traditionally to be accorded by us to the Board's determinations [citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612, n. 32 (1969); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *International Union of Electrical Workers v. NLRB (Tidee Products)*, 426 F.2d 1243, 1250 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 950]" (Pet. App. 7A-8A). (The first two of the cited cases involved claims by a respondent that the Board's remedy was too broad. In the third case, which involved a claim by the charging party that the remedy was too narrow, the Board accepted the remand. The joint citation of these three precedents proves that the Court of Appeals was not applying a double standard.) Furthermore, in upholding the Board's determination in this case that a make-whole remedy was not warranted, the court said: "[W]e are not inclined to say that the Board's treatment of this issue on remand is beyond the wide range of latitude traditionally accorded the Board in the matter of remedies" (Pet. App. 16A-17A).

II. THE COURT BELOW ACTED WELL WITHIN ITS ALLOTTED REVIEWING AUTHORITY IN ENLARGING THE REMEDIES ORDERED BY THE BOARD

A. The Court Correctly Concluded That the Board Acted Arbitrarily in Refusing To Award Litigation Expenses

In enlarging the Board's remedy here, the court below obeyed the mandate of Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, that reviewing courts shall:

"... hold unlawful and set aside agency actions, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;"⁵

⁵ This Court has enunciated in several ways the proper standard of judicial review of agency remedies, all of which, while arguably subject to varying interpretations, appear to reflect the governing standard prescribed by Section 706 of APA. See, e.g., *American Power Co. v. S.E.C.*, 329 U.S. 90 ("... only if the remedy chosen is unwarranted in law or is without justification in fact should a court attempt to intervene . . .," at pp. 112-113; "... so lacking in reasonableness as to constitute an abuse of [the agency's] discretion," at p. 115); *F.T.C. v. Universal-Rundle Corp.*, 387 U.S. 244 ("patently arbitrary and capricious," at p. 250; "a patent abuse of discretion," *ibid*); *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608, 612 (whether the agency "abused its discretion"); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612, n. 32 ("[the Board's] choice of remedy must therefore be given special respect by reviewing courts").

It should be noted that the Board cites (Br. 13, 14) certain formulations of the scope of review appearing in cases where the remedy was claimed to be excessive which obviously cannot be applied to cases, like this one, in which the remedy is challenged as inadequate to effectuate the policies of the Act. E.g., "... unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act" (*Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540); "... no reasonable relation to the unlawful practices found to exist" (*Jacob Siegel Co.*, *supra*, at 613).

Comprehensive definition of the terms "arbitrary" "capricious," and "abuse of discretion" is no simple task.⁶ One manifest category of agency arbitrariness, however, and the one which prompted the court below to rule as it did, is invidious inconsistency.

When an agency treats disparately two situations which are fundamentally alike, with no rational basis drawn for the distinction, it oversteps one of the outer boundaries of agency authority—the prohibition against "arbitrary" action. This elementary principle was invoked by this Court in *NLRB v. United Mine Workers*, 355 U.S. 453, 460, 463, where the Court rejected a cease-and-desist order which, the Court recognized, "misapplies the Board's own policy" and thus "constitutes an abuse of the Board's discretionary power". See also, *NLRB v. Mall Tool Co.*, 119 F.2d 700, 702 (7 Cir.) (rejecting the Board's departure from a settled back pay practice: "Consistency in administrative remedies is essential, for to adopt different standards for similar situations is to act arbi-

⁶ The courts have treated the terms interchangeably. *Hartford-Empire Co. v. Obear-Nester Glass Co.*, 95 F.2d 414, 417 (8 Cir.) ("abuse of discretion" is "arbitrary action not justifiable"); *Gonzalez v. Freeman*, 334 F.2d 570, 580 (D.C. Cir.) ("[B]ecause arbitrary and capricious . . . , hence an abuse of discretion").

In construing all these terms as they appear in the Administrative Procedure Act, this Court, in *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, adopted the definition of "abuse of discretion" proffered by Judge Magruder in *In Re Josephson*, 218 F.2d 174, 182 (1 Cir.), the Court restating the test as "whether the decision was based on a consideration of the relevant factors and whether there has been a *clear error of judgment*." (Emphasis added.) Professor Berger suggests simply that "arbitrariness consists of action that is unreasonable under all the circumstances." Berger, *Administrative Arbitrariness and Judicial Review*, 65 Col. L. Rev. 55, 82 (1965).

trarily."); *Burinskas v. NLRB*, 357 F.2d 822, 827 (D.C. Cir.) ("... the Board cannot act arbitrarily nor can it treat similar situations in dissimilar ways"); *Cooper Thermometer Company v. NLRB*, 376 F.2d 684, 691 (2 Cir.); *J. P. Stevens & Co. v. NLRB*, 406 F.2d 1017, 1024 (4 Cir.); Wright, *Beyond Discretionary Justice*, 81 Yale L. J. 575, 594 (1972) ("One of [the courts'] underlying functions is to ensure that official action is not irrational or invidious."). The Board's lengthy argument (Br. 17-23) that the court below erred in concluding that *Tiidee* undercut the Board's rationale in this case is implicit recognition that the Board's order could not stand if, in fact, it had been undermined by *Tiidee*.⁷

⁷ Certain characteristics peculiar to administrative agencies must, of course, necessarily influence a reviewing court's judgment of whether an agency has acted arbitrarily. Thus, while an agency is barred from inconsistency, it may lawfully indulge in inconsistency. *FCC v. WOKO*, 329 U.S. 223, 228; *Motor Freight Express v. United States*, 119 F. Supp. 298, 305 (M.D. Pa.), affirmed *per curiam* 348 U.S. 891 ("... an agency may change its mind."). Here, however, the Board did not simply change its mind, see n. 12, *infra*.

In addition, the superior expertise brought to bear by an agency has often been stressed by this Court in emphasizing the need to give an agency leeway in constructing a comprehensive remedial system which takes into account the often esoteric and arcane considerations implicated in the statute administered by the agency. See, for example, *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413. Where, however, as in this case, the agency's invidious determination can in no wise be defended as either a "change of mind" by the agency or an exercise of "specialized, experienced judgment" (*Moog Industries, Inc.*, *supra*) based on "accumulated experience and knowledge which no court can hope to attain," *American Power Co. v. S.E.C.*, *supra*, 329 U.S. at 112, then the "special respect" due its choice of remedies is necessarily diminished. See, *S.E.C. v. Cogan*, 201 F.2d 78, 83-87 (9 Cir.); *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141, 150-151 (9 Cir.); L. Jaffe, *Judicial Control of Administrative Action*, 577, 579 (1965).

In light of *Tiidee*, the court below elected to decide simply whether the Board had acted arbitrarily in refusing to apply in this case the rationale it enunciated for granting the remedy in *Tiidee*—a rationale grounded not on administrative expertise but solely on the public interest in deterring wrongdoing employers from clogging Board and court dockets. That question was of “such a nature as to be peculiarly appropriate for independent judicial ascertainment as [a] ‘question of law’,” *O’Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508, and the determination of the court below that the Board had not adequately justified its inconsistent treatment of this case and *Tiidee* was the very stuff of *judicial* expertise, and indeed a classic example of the appropriate role of the judiciary in reviewing administrative action. See *SEC v. Cogan*, *supra*; *NLRB v. Guy F. Atkinson Co.*, *supra*.

The court of appeals merely placed the Board’s supplemental decisions in *Tiidee* and in this case side by side, and concluded that the latter could not rationally stand beside the former.⁸ In its original decision in the instant case, the Board drew an inference of “bad faith” and found that Heck’s “refusal to recognize the Union was not based on a good-faith doubt of the Union’s majority status” (Op. App. 4a, 5a). Despite this express finding, the Board announced, in its supplemental decision (Pet. App. 38A-39A), as a general

⁸ The Board accuses the court below of having misread *Tiidee* in concluding that aggravated misconduct, as well as a frivolous defense, warrants the remedy (Br. 21-23). But, of course, the court fully appreciated what the Board had said in *Tiidee*; its holding here was simply that the Board could not reasonably differentiate between “frivolous defenders” and “willful violators,” inasmuch as both “unduly burden the processes of the Board and the courts” (Pet. App. 10A).

rule, that it would not award litigation expenses to a charging party, because of (1) the asserted subordinate role of the charging party in the statutory scheme; (2) the Board's policy of disregarding "collateral losses"; (3) the Board's lack of power to grant "punitive" relief; and (4) the supposed general American rule which denies counsel fees to the successful party in litigation. In the subsequent *Tiidee* supplemental decision awarding counsel fees for what it termed "frivolous litigation," the Board obviously retreated from all of these reasons. The express and only rationale for this exception was to free "crowded court dockets, as well as [the Board's] own" from the burdens imposed by employers seeking to delay compliance with their statutory obligations.

Board counsel now argue that the results in the two cases are reconcilable—that the Board drew a permissible distinction between "frivolous litigation," such as the Board found *Tiidee* to be, and litigation in which the respondent presents "debatable" issues, which the Board's brief now asserts is a proper characterization of the *Heck*'s litigation. Assuming the validity of this analysis of the two cases, it must be emphasized that, as pointed out above, the Board's first decision in this case found that *Heck*'s refusal to recognize the Union had been in "bad faith."⁹ As the court below recognized, rationality precludes any viable distinction between the remedies to be afforded those who must suffer the expense of prosecuting violations defended on "frivolous" grounds and those who are compelled to incur such expenses by "bad faith" refusals to bargain

⁹ In an effort to gloss over the Board's original finding, the Board's brief (p. 21, n. 14) looks for solace to the Trial Examiner's finding of good faith, which the Board subsequently reversed.

The avowed objective of *Tiidee's* award of litigation expenses in "frivolous proceedings" is to further "speedy access to uncrowded Board and Court dockets" (A. 35, 36). However, when an employer in "bad faith" refuses to extend recognition to a union, thereby compelling the Union and the Board to resort to litigation to achieve what the Union should have had earlier and without litigation, he necessarily falls within the class of violators who unjustifiably clog "access to . . . Board and court dockets." If an employer engages in illegal conduct for the purpose of delaying compliance with his statutory duty, the resultant litigation unnecessarily burdens Board and court dockets, regardless whether the employer is able to present in the litigation a defense which may be characterized as "debatable."¹⁰

¹⁰ The allegedly "debatable" defense here appears to be some minimal and completely suspect testimony, discredited by the Trial Examiner, from two employees, purportedly casting doubt on the validity of four authorization cards obtained by the Union prior to its first request for recognition on May 20, 1967 (A. 13-16); a poll of employees (found to be "palpably illegal"), in which employees were approached by Heck's vice president and asked to sign a slip of paper indicating their desires as to union representation (A. 6-7, 12); and Heck's success in three instances in the past in challenging union claims of majority representation (A. 17). The Trial Examiner's decision shows, however, that while the illegal poll had inconclusively indicated 11 employees in favor of the Union, 13 against, 6 registering "no comment" and 3 not polled (A. 7, n. 4), the company's blatantly false response to the Union's first demand for recognition was that "a majority of the employees have advised the Company that they did not desire your union to represent them" (A. 16). It is clear from this immediate manifestation of bad faith that the Company was ready and willing to prevaricate in order to gain time in which to forestall recognition at all costs, up to and including litigation of the Union's right to be recognized. The fact that the company adventitiously succeeded in dredging up testimony which could theoretically serve as

In attempting to discourage impediments to "speedy access to uncrowded Board and court dockets" (A. 35-36), the Board could not rationally draw a distinction between an employer who asserts a frivolous reason for refusing to bargain and an employer, like Heck's which has been found in the past to have a "labor policy in all its stores that is opposed to the policies of the Act," which has engaged in "flagrant repetition of conduct [showing] a complete disregard . . . of its obligations under the Act" (Op. App. 3a, 4a), and which in the present case has been found guilty of "clearly aggravated and pervasive" misconduct (Pet. App. 29A) obviously calculated to obstruct bargaining and, thereby, foreseeably and inevitably, compelling litigation which unjustifiably clutters Board and court calendars.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, this Court held that the Board may properly enter a bargaining order on the basis of authorization cards signed by employees, despite the fact that the union has not prevailed in an election, where the Board concludes that the employer's coercive anti-union conduct has made it unlikely that an election would fairly reflect employee sentiment. An employer who engages in such wrongful conduct in an effort to stave off unionization thus, under the *Gissel* test, fairly invites litigation to determine the propriety of issuance of a bargaining order. In light of the *Gissel* rule, accordingly, a court would be impelled to conclude, as the court

a basis for defending against the General Counsel's complaint cannot justify the employer's determined non-compliance with its known obligations under the Act or relieve it of the need to remedy the effects of the consequent compulsion upon the Union to resort to the Board for relief.

below did, that an employer who deliberately engages in willful coercion and restraint of employees, thereby provoking litigation to determine whether his wrongful conduct likely had the prohibited effect, is conceptually indistinguishable from an employer who interposes a frivolous objection to a bargaining demand which similarly provokes litigation. Cf. *NLRB v. Trama*, 293 F.2d 28 (9 Cir.).¹¹

The Board says that in distinguishing between "frivolous" and "non-frivolous" respondents, it is reasonably balancing "conflicting *legitimate* interests" (Br. 19; emphasis added). That argument might be persuasive if the "non-frivolous" respondent was not also a recidivist. But where the Board is confronted with a willful, bad-faith, offender like Heck's, there is no "*legitimate* private interest" (Br. 18; emphasis added), and no legitimate public interest, in allowing the respondent "to obtain an adjudication of the issues

¹¹ In marked contrast to this case, the decision of the Court of Appeals for the Eighth Circuit reversed by this Court in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, clearly exceeded the recognized bounds of judicial review. The lower court there had found "unconscionable" a suspension of a registrant imposed by the Secretary of Agriculture. The Secretary had concluded that suspension was appropriate "in light of respondent's disregard of [three] previous warnings" (411 U.S. at 181). Whether or not the Secretary had a prior practice of imposing suspensions only for "intentional and flagrant conduct" (see 411 U.S. at 187), in *Glover* the Secretary had examined the history of the registrant's conduct to determine the appropriate penalty for a fourth violation, thus taking into account the special circumstances relevant to the proper sanction for the particular offender before him, and it was beyond the province of the court of appeals to judge that some lesser sanction would be "appropriate and reasonable." In this case, on the contrary, as the court below noted, the abstract considerations which motivated granting the relief in *Tiidee* "are also operative here" (Pet. App. 9a-10a).

he presents" (Br. 19) without at least risking payment of his victim's counsel fees if his conduct is ultimately found to be a flagrant, willful, bad faith violation. For award of counsel fees must be considered in the perspective of the Board's charter, which commands that it devise "remedies to effectuate the policies of the Act." *Labor Board v. Seven Up Bottling Co.*, 344 U.S. 344, 346. The Board must, therefore, assure that its remedies do not "operate[] in a real sense so as to be counter-productive, and actually reward an employer's refusal to bargain during the critical period following a union's organization of his plant." *Tiidee* case, *supra*, 426 F.2d at 1249. To this end, in cases of "brazen refusal to bargain" (*id.*) the Board must "at least do something to advance the policies of the Act and prevent the employer from having a free ride during the period of litigation." (*Id.* at 1251). In the context of this statutory mandate, it is arbitrary for the Board to separate "considerations of [Board and] judicial administration" from "furtherance of national labor policy" (*id.* at 1249), and pursue only the former. When both private and public interests in discouraging willful, brazen refusals to bargain "collide[]" with the asserted "right" of a bad faith violator to litigate his defenses without risking assessment of counsel fees, the latter must give way. See pp. 32-36, *infra*.

B. The Court Properly Held That the Board Acted Arbitrarily in Failing To Award Excess Organizational Expenses

The court below also correctly concluded that, under the *Tiidee* rationale, organizational costs must be awarded here.

In its supplemental decision in the instant case, the Board determined that such costs were not compen-

sable for three of the same reasons it gave for denying counsel fees, *i.e.*, (1) the statutory role played by the charging party; (2) the principle that "Board orders must be remedial not punitive"; and (3) the principle that collateral losses are not considered in framing a reimbursement order" (Pet. App. 38A, 39A). However, in *Tiidee*, these generalizations disappeared; the only reason advanced by the Board for denying such expenses was that it found "no nexus between Respondent's unlawful conduct . . . and the Union's preelection organizational expenses." Tellingly, it concluded: "[A]ccordingly, we shall not award [such expenses] to the Union" (A. 35; emphasis added).

In contrast to its cautious caveat in *Tiidee* expressly disagreeing with the court's opinion that the Board is empowered to enter a make-whole remedy, the Board uttered not a whisper of dissent from the court's suggestion on remand that the Board is authorized to award excess organizational costs. Instead, because it found no relationship between the unlawful conduct and the preelection organizing outlays, the Board simply decided that "we shall not award" expenses to the union. But in *this* case, the Board expressly recognized the "probability that the Charging Party has spent more money on organizational costs . . . than it would have spent had [Heck's] not refused to bargain (Pet. App. 38A).

Since the three factors upon which the Board relied here for denial of relief were plainly discarded in *Tiidee*; since the right to recoupment of such expenses was clearly recognized in *Tiidee*; and since the Board itself found probable nexus here between Heck's violations and the Union's excess organizing expenses, the court was led irresistibly to its conclusion that nothing

in the Board's supplemental decision "constitutes an adequate justification" for denial of the claim for extraordinary organizational costs.

In sum, the court of appeals, far from substituting its judgment for the Board's, as the Board now contends, merely held that the Board's own standards compelled the grant of the requested remedy, and that any other result was necessarily "unwarranted in law." *American Power Co. v. S.E.C.*, 329 U.S. 90, 112.

C. No Remand Was Required

The Board contends that if the court below believed that *Tiidee* and the instant decision were inconsistent, "it should have remanded the case to the Board to consider whether and in what manner the change should affect the remedy in this case" (Br. 28). But the relevant history shows that remanding the case would have been pointless and unwarranted.

In the supplemental decision in *Tiidee*, in which the Board articulated its rationale for granting legal expenses and withholding organizing expenses, it expressly cited its supplemental decision here, thus clearly indicating its conclusion that those legal considerations which moved it to action in *Tiidee* did not, in the Board's opinion, require the same result in this case. Further, when the Union lodged the *Tiidee* decision with the court prior to argument in this case (A. 43), with a supporting memorandum asserting that the intervening *Tiidee* rationale required reversal in this case, the Board made no written response, and its counsel in oral argument did not suggest or request a remand for reconsideration. In these circumstances, the Board may not be permitted to occasion further delay, particularly where any decision it might reach

contrary to that of the court below could not legally survive still another court review. "The Board has had its chance This case has now reached a posture where there is only one rational course for the Board to follow." *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. NLRB*, 459 F.2d 1329, 1347 (D.C. Cir.).¹²

¹² The Board (Br. 28) cites *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20, for the proposition that "... when an error of law is laid bare . . . the matter once more goes to the [agency] for reconsideration." That course of action is appropriate in cases such as *Idaho Power*, where the reviewing court had found the agency to lack authority to attach particular conditions to a license; as this Court noted, options were still open to the agency: "On remand the Commission might have reissued the order without the contested conditions or it might have withheld its consent to any license" (344 U.S. at 20). Here, however, there was only one corrective for the Board's invidious discrimination in favor of Heck's—to grant the *Tiidee* remedy. Where the error of law leaves no room for further exercise of administrative discretion, remand is unnecessary. See *Labor Board v. Express Publishing Co.*, 312 U.S. 426; *Labor Board v. Jones & Laughlin Steel Co.*, 331 U.S. 416.

The Board's further contention that the court below regarded *Tiidee* as a "change of policy," requiring remand of this case for consideration of whether the "change of policy" should be applied retroactively (Br. 27-28), misapprehends the court's decision. The court fully recognized that (as the Board now argues) *Tiidee* announced a previously undeclared exception to the rule enunciated in this case, not a complete abandonment of that rule. The court merely held that the rationale underlying that exception must necessarily encompass the facts of *this* case, a contention the Board had already rejected by distinguishing the instant case in its supplemental decision in *Tiidee*. Since this case was the first to present the question whether the "frivolous defense" exception necessarily encompasses bad faith violations, retroactivity considerations are not a bar. "Every case of first impression has a retroactive effect" *Security & Exchange Commission v. Chenery*, 332 U.S. 194, 203. The Board had already demonstrated, by its award of counsel fees in *Tiidee*, that it considered this kind of retroactivity no obstacle.

III. EVEN ABSENT TIIDEE, THE BOARD ABUSED ITS DISCRETION IN NOT AWARDING LITIGATION AND ORGANIZATIONAL EXPENSES IN THIS CASE

A. The Board Abused Its Discretion in Disallowing Legal Fees Here

Respondent submits that, pretermittting the conclusive effect of the intervening decision in *Tiidee* on this case, the Board's refusal to compensate the Charging Party for litigation expenses engendered by Heck's flagrant misconduct constituted an abuse of administrative discretion, subject to judicial modification.

Section 10(c) of the Act (61 Stat. 147, 29 U.S.C. § 160(c)) enjoins the Board, upon finding that an unfair labor practice has been committed, "to take such affirmative action . . . as will effectuate the policies" of the Act. This Court has characterized that injunction as a "broad command," *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262, which, as the Court of Appeals for the District of Columbia Circuit has said, "is not a mere charter of authority that the Board has the option to exercise or ignore." *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB (Tiidee Products, Inc.)*, 426 F. 2d 1243, 1249.

"[T]he business of the Board, among other things, is to adjudicate and remedy unfair labor practices," *NLRB v. Strong*, 393 U.S. 357, 360; "Section 10(c) . . . charges the Board with the task of devising remedies to effectuate the policies of the Act," *Labor Board v. Seven-Up Co.*, 344 U.S. 344, 346. And, in devising such remedies, the Board must concern itself with "the undoing of the effects" of unfair labor practices, *Virginia Electric & Power Co. v. Labor Board*, 319 U.S.

533, 540, the "restoration of the situation, as nearly as possible, to that which would have obtained but for the" wrongful conduct, *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 194. It cannot be gainsaid that a refusal by the Board to order a plainly appropriate remedy, where it justifies such inaction upon patently indefensible grounds, is an abuse of discretion which a reviewing court is not merely empowered but obliged to correct.

The *power* of the Board to award compensation for litigation expenses in appropriate cases is not disputed and the Board expressly recognized the existence of that power in its supplemental *Tiidee* decision. The question presented, therefore, is whether the Board acted arbitrarily and in defiance of the Section 10(c) mandate in refusing such an order against Heck's, as intransigent and unconscionable an offender as the Board has ever had before it.

In its supplemental decision here, the Board initially named three considerations it thought relevant to the requested relief: "the role of a charging party under the statutory scheme in the light of the basic principles that Board orders must be remedial not punitive, and collateral losses are not considered in framing a reimbursement order," but it finally rested upon the "statutory framework" in concluding that "the public interest in allowing the Charging Party to recover the costs of its participation in this litigation does not override the general and well-established principle that litigation expenses are ordinarily not recoverable" (Pet. App. 38A, 39A). It is clear that, as *Tiidee* demonstrates, the Board thought its "punitive" and "collateral loss" concerns to be as inconsequential

as they are,"¹³ and that the Board's primary reasons for refusing to reimburse these direct losses were the asserted nature of the traditional American rule governing recovery of such losses and the asserted role of the charging party in the statutory scheme. On both counts, the Board misconceived the applicable law.

Essentially, the Board reasoned as follows:

1. The general American rule is that litigation expenses are not recoverable.

2. While there is a measure of "public interest" in allowing a charging party to recover such expenses, it is not on balance sufficient, in view of the "statutory framework," to override the asserted general principle.

Thus, although the Board perceived a sound basis for awarding counsel fees to charging parties, it believed that basis insufficient to permit departure from what it conceived to be a judicially-established rule against such recoveries. As we shall establish *infra*, the Board misconceived the scope of that rule, and thereby erred as a matter of law. The Board argues here, however, that even if the federal courts have traditionally awarded fees in cases analogous to this one (which the Board denies), it does not follow that the Board must do likewise (Br. 24). But by relying on the "general and well-established rule," the Board

¹³ In awarding such costs in *Tiidee*, the Board properly recognized that the expenses are not collateral, but rather direct losses attributable to the employer's misconduct, and that the remedy is not "punitive" in the sense contemplated by *Republic Steel Corporation v. NLRB*, 311 U.S. 7, 11-12, but rather constitutes compensation for losses, precisely measured by the expenses incurred by the union which the employees have chosen as their representative, resulting from the employer's violations of the Act. See *Labor Board v. Seven-Up Co.*, 344 U.S. 344, 348.

itself was sensibly recognizing that, in this area, which is alien to Board expertise, the distillate of years of judicial experience in determining when the award of legal fees is remedially appropriate would perforce be applicable to Board remedies, unless some good reason appeared for *not* applying the normal rule.¹⁴ The Board's instinct was correct; it simply misconceived what the judicial rule is.

We are nonplused by the Board's contention that the "bad faith" exception, as explicated in the cases cited in our brief in opposition, applies *only* where the "losing party has . . . acted in bad faith *in the litigation itself*" (Br. 24, n. 17, emphasis added). The historic "bad faith" exception clearly applies to the illegal conduct which *provoked* the litigation, regardless whether the losing party also acted in "bad faith in the litigation itself."

Thus, in the leading case, *Vaughan v. Atkinson*, 369 U.S. 527, this Court noted that counsel fees were allowed in *The Apollon*, 9 Wheat. 362, ". . . an admiralty suit where one party was put to expense in recovering demurrage of a vessel *wrongfully seized*" (369 U.S. at 530; emphasis added). And the dispositive passage on this point in *Vaughan*, only partially quoted by the Board (Br. 24-25, n. 17), demonstrates that it was the

¹⁴ The Board's citation (Br. 24) of *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, for the proposition that the Board is "not bound by settled judicial precedents" not only overlooks the fact that the Board here explicitly *did* rely on judicial precedents, but also that *Chenery* sustained the power of agencies to go *beyond* judicial precedents to effectuate statutory policy. It does not stand for the proposition that an agency can claim to be performing its statutory duty where it stops short of granting well-established compensatory remedies.

nature of the default, not the absence of an arguable litigation defense, for which compensation was ordered:

"In the instant case respondents were *callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance*, libellant was forced to hire a lawyer to get what was *plainly owed him* under laws that are centuries old. The *default was willful and persistent.*" (*Id.* at 530-531; emphasis added.)

In *Local No. 149, United Auto Workers v. American Brake Shoe Co.*, 298 F.2d 212, 216 (4 Cir.), the court, addressing the facts of the case, held that "[i]n an appropriate case attorneys' fees should be awarded against a party who, without justification, refuses to abide by the award of an arbitrator." It did *not* say, as the Board now states (Br. 24, n. 17), that such fees will be awarded "only" in such circumstances. Further, it very plainly did not imply any such limitation, for, earlier in its opinion (at p. 215), the court had described the general rule to be that such costs may be recovered "in the case of fraud, oppression, or bad faith cases of fiduciary relationship" (quoting from *Specialty Equipment & Machinery Corp. v. Zell Motor Co.*, 193 F.2d 515, 520-521 (4 Cir.)) and where the "*wrongdoers' action is unconscionable, fraudulent, willful, in bad faith, vexatious or exceptional*" (citing 11 cases; emphasis added).

The Board's attempt to distinguish the other cases cited in our brief in opposition is equally untenable. In *Brewer v. School Board of the City of Norfolk, Virginia*, 456 F.2d 943, 949 (4 Cir.), the court expressly noted that the bad-faith exception is two-pronged:

"The other normal exception to the general rule is illustrated by those 'exceptional cases' 'where

the behavior of a litigant has reflected a willful and persistent "defiance of the law" [citation omitted] or where 'an unfounded action is brought or maintained in bad faith, vexatiously, wantonly, or for oppressive reasons.'" (Emphasis added.)

So too, in *Siegel v. William E. Bookhultz & Sons, Inc.*, 419 F.2d 720, 723 (D.C. Cir.):

"Courts in some number have held that a party may recover the fees of his counsel where the conduct of his opponent has been oppressive [citations omitted]." (Emphasis added.)

In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, upon which the Board relied for the "general rule" (Pet. App. 39A), this Court made it clear that recovery of fees incurred as a result of "deliberate or willful infringement" of a trademark would have been consistent with the established "bad faith" exception (as at least five courts of appeals had previously held, *Fleischmann*, 386 U.S. at 715-716, n. 4), were it not for the intricate remedial system established in the Lanham Act which, the Court inferred, indicated a Congressional intent not to allow attorneys' fees as a remedy for the statutory cause of action.

More recently, in *Hall v. Cole*, 412 U.S. 1, 5, the Court stated the rule as follows:

"Thus, it is unquestioned that a federal court may award counsel fees to a successful party *when his opponent has acted* 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" (Emphasis added.)¹⁵

¹⁵ The citation for the quoted phrase is 6 Moore's *Federal Practice* ¶ 54.77[2], p. 1709 (2d ed. 1972). It is of interest to note that the Board cites this source in its brief (p. 19, n. 12), setting out as

The Court cited for this proposition, *inter alia*, *Bell v. School Board of Powhattan County*, 321 F.2d 494, 500 (4 Cir.) (where counsel fees were awarded because of "... the long continued pattern of evasion and obstruction which included not only the defendants' unyielding refusal to take any initiative, thus casting a heavy burden on the children and their parents, [but also] their interposing a variety of administrative obstacles to thwart the valid wishes of the plaintiffs for a desegregated education."), and *Rolar v. Atlantic Coast Line R. Co.*, 186 F.2d 473, 481 (4 Cir.) ("The justification [for an award of counsel fees] here is that plaintiffs of small means have been subjected to discriminatory and oppressive conduct by a powerful labor organization ...").

In short, the analysis contained in footnote 17 of the Board's brief not only misstates the thrust of the cases there discussed, but improperly truncates the broad reach of the "bad-faith" exception.

Since Heck's is, in the *Vaughan* sense, a "willful and persistent" violator, and since the charging party's litigation expenditures in such cases are the *direct* result of the wrongdoer's unconscionable conduct (*Vaughan* case, *supra*), there can be no doubt whatever of the Board's duty under Section 10(c) of the Act to grant this remedy at least here and in all cases

well the modifying phrase with which Professor Moore prefaced the quoted language: "where an unfounded action or defense is brought or maintained in bad faith, etc." It is apparent that the Court's substitution in *Hall* of the operative factor—"when his opponent has acted" in lieu of "when an unfounded action or defense is brought or maintained"—was intended to express disapproval of Professor Moore's unwarranted limitation on prevailing precedent.

governed by the exception to "the general and well established principle" described above.¹⁶

The Board having misunderstood the "general and well established principle," and having overlooked the exception which governs this case, there remains only the Board's excuse that private parties and their counsel should be denied compensation for their efforts because Congress vested in the Board and its counsel the "primary initial responsibility to determine and protect the public interest" in eliminating unfair labor practices. It should be observed at the outset that any persuasive force this argument may have had before *Tiidee* has been sapped by the Board's award of litigation fees to a charging party in that case. But pre-scinding the virtual abandonment of this contention in *Tiidee*, it is apparent that, while purporting to pay lip-service to *Auto Workers v. Scofield*, 382 U.S. 205, the Board, in actuality, flouts it. *Scofield* "interred in the cause of wisdom"¹⁷ the outworn "public interest" dogma, on which the Board had so long and successfully relied to justify stifling, curtailing, and derogating the role of charging parties and their private counsel in unfair labor practice cases. This Court not only explicitly repudiated the "public" versus "private" interest dichotomy (*Scofield*, 382 U.S. at 218; *id.* at 220-222), holding that "the two interblend in the intricate statutory scheme," but explicitly held that, at least since 1947, the Board's self-image as a unique

¹⁶ Since, as discussed, the exception applies to wrongdoers who have acted in bad faith, as well as to those who have litigated in bad faith, the Board's purported distinction between "frivolous" and "debatable" litigation is, under the established American rule governing award of counsel fees, irrelevant.

¹⁷ *Amalgamated Meat Cutters and Butcher Workmen, AFL-CIO v. Connally, et al.*, 337 F. Supp. 737, 745 (D.C. D.C. 1971).

Sir Lancelot, single-handedly battling to effectuate the public interest in eradicating unfair labor practices, is quite false: "[S]ince 1947, [the Board] serves substantially as an organ for adjudicating private disputes" (382 U.S. at 221, note 18, penultimate sentence). Indeed, the Court held that "the Labor Act recognizes the existence of private rights within the statutory scheme" and "the rhetoric of 'public interest' * * * [does] not * * * imply that the public right excludes recognition of parochial private interests" (382 U.S. at 218).

On these premises the Court concluded that the charging party and its private counsel are entitled by the Act to rights and prerogatives of intervention and certiorari application which the Board vigorously opposed as unnecessary and indeed detrimental to *its* status and *its* interests as *dominus litus* (382 U.S. at 217-222). Yet despite its defeat in *Scofield*, the Board continues to insist that the Act is concerned only with protection of the "public interest," and that inasmuch as the charging party's contribution to that interest "is incidental to its efforts to protect its own private interest," its litigation costs and counsel fees are non-compensable.

Of course, the Board's conclusion does not follow from its premise. Even if, contrary to the Board's own concession, the charging party's efforts served *only* to protect and vindicate private interests, its litigation costs and fees would be compensable, because the Act encompasses and seeks to promote and protect private rights and interests, no less than public ones. *Scofield* case, *supra*, 382 U.S. at 218, 220; *NLRB v. Strong*, 393 U.S. 357, 360-361. However, the conceded fact is that because the private rights and public inter-

est "interblend," it is *inevitable* that in vindicating its private rights and interests, the charging party will be vindicating the "public interest" as well. Thus, counsel for a successful charging party acts, *pro tanto*, as a "private attorney general" in enforcing a policy Congress deems highly important. Cf. *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205, 211, and cases therein cited. The presence of an administrative agency with enforcing authority is not a bar to recognition of this function of the charging party. *Ibid.*

This case demonstrates that absent the contribution of private counsel for the charging party, the violations alleged often would not be adequately established, to the detriment of public and private interests alike. And the cases are legion in which private counsel representing the charging party have upset Board determinations which frustrated the "public interest" by denying to the charging party statutory rights and remedies¹⁸ it validly claimed. The charging party is often required, as it was here, to resort to the courts to obtain forms of relief which the General Counsel did not seek and which the Board denied but which are

¹⁸ *Local 833, UAW-AFL-CIO v. N.L.R.B.*, 300 F.2d 699 (D.C. Cir.), cert. denied, 382 U.S. 836; *UAW v. N.L.R.B.*, 381 F.2d 265 (D.C. Cir.), cert. denied, 389 U.S. 857; *UAW v. N.L.R.B.*, 427 F.2d 1330 (6 Cir.); *Textile Workers v. N.L.R.B.*, 294 F.2d 738 (D.C. Cir.); *Concrete Materials of Georgia, Inc. v. N.L.R.B.*, 440 F.2d 61 (5 Cir.); *Burinskas v. N.L.R.B.*, 357 F.2d 822 (D.C. Cir.); *N.L.R.B. v. Borg Warner*, 236 F.2d 898 (6 Cir.), unfair labor practice issue modified in other respects, 356 U.S. 342; *Frito v. N.L.R.B.*, 330 F.2d 458 (9 Cir.); *N.L.R.B. v. Harrah's Club*, 362 F.2d 425 (9 Cir.), cert. denied, 386 U.S. 915; *American Newspaper Pub. Assn. v. N.L.R.B.*, 193 F.2d 782 (7 Cir.), cert. denied on other grounds, 344 U.S. 816, aff'd 345 U.S. 100; *International Woodworkers of America, Local 3-10 v. N.L.R.B.*, 380 F.2d 628 (D.C. Cir.).

literally indispensable to make effectuation of the "public interest" a reality. Proceeding "in accordance with equitable principles," the court below has predicated award of counsel fees on just such contributions "to the public interest in observance by administrative and executive officials of statutory limitations on their authority." *Freeman v. Ryan*, 408 F.2d 1204, 1206 (D.C. Cir.).

In short, the issue is not whether the charging party's participation is "incidental to its efforts to protect its own private interest," for a selfish motive on the part of the charging party is an utter irrelevancy. *Young v. Higbee Co.*, 324 U.S. 204, 214. The only relevant question is whether it will "effectuate the policies of the Act" to compensate the charging party's successful litigation efforts and deprive the wrongdoer of at least that portion of the fruits of its "willful and persistent" violations which constitutes the charging party's expenditures for costs and private counsel fees to prove and adequately to remedy those violations. See *Tiidee Products*, *supra*, 426 F.2d at 1251.

The Board's assumption that because Congress relied "primarily" upon an administrative agency and its lawyers to effectuate the public interest, it left no room for awards of counsel fees and costs to private parties aggrieved by the violation is utterly exploded not only by the Board's subsequent decision in *Tiidee*, but, as well, by this Court's decisions in *J. I. Case Co. v. Borak*, 377 U.S. 426, and *Mills v. Electric Auto-Lite*, 396 U.S. 375. In *Borak*, the court implied a private right of action under Section 14(a), where none was expressly given by Congress, because "[p]rivate enforcement of the proxy rules provides a necessary supplement to [Securities and Exchange] Commission

action." 377 U.S. at 432. In *Mills*, the court held that successful private litigants in such actions should be awarded litigation expenses and reasonable attorney's fees for the very same reason that warranted implying a private right of action; namely, to encourage private suits, which, in turn, aid in "vindicating the statutory policy." 396 U.S. at 391, 396, twice citing with approval *Bakery Workers Union v. Ratner*, 335 F.2d 691, 696-697 (D.C. Cir.).

In contrast to Section 14(a) of the Securities Exchange Act, the NLRA explicitly provides a role for private parties in unfair labor practice cases. Indeed, without a charge filed by a private person, the Board is powerless even to initiate a proceeding under Section 10. *N.L.R.B. v. Fant Milling Co.*, 360 U.S. 301; *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238. Serving the charge, producing adequate supporting evidence and persuading the Regional Director, or, on appeal, the General Counsel, to issue a complaint (or one of adequate breadth), is the burden of the charging party exclusively. NLRB Rules and Regulations, Series 8, as amended, Sections 102.14, 102.15, 102.19; *ibid.*, Statements of Procedure, Sections 101.2, 101.4. The role of the charging party and its private counsel after a complaint issues is detailed in *Scofield*, 382 U.S. at 219.¹⁹

The necessity in every case of filing and adequately supporting a charge, and the provision of a statutory

¹⁹ For other aspects of the charging party's rights which likewise can be vindicated effectively only by competent private counsel, see *Spector Freight Systems*, 141 NLRB 1110; *Walsh-Lumpkin*, 129 NLRB 294; *Textile Workers Union v. N.L.R.B.*, 294 F.2d 738 (D.C. Cir.); *Leeds & Northrup v. N.L.R.B.*, 357 F.2d 527 (3 Cir.); *Concrete Materials of Georgia, Inc. v. N.L.R.B.*, 440 F.2d 61 (5 Cir.).

right to review adverse rulings of the Board provides a far stronger basis here than in *Borak* and *Mills* for concluding that Congress sought to encourage successful participation by the charging party through private counsel by awarding litigation costs and counsel fees.

The Board's citation of and reliance upon *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (Pet. App. 39A), simply reflects a misconception of the holding and rationale of that case. As this Court explained in *Mills v. Electric Auto-Lite*, 396 U.S. 375, 391, because Congress in the remedial provision of the Lanham Act:

"had 'meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed,' the Court in *Fleischmann* concluded that the express remedial provisions were intended 'to mark the boundaries of the power to award monetary relief in cases arising under the Act.' "

By contrast, here, as in *Mills*, one cannot fairly infer from the "broad command" of Section 10(c) of the NLRB a purpose to circumscribe the Board's power to grant appropriate remedies.

In *Gartner v. Soloner*, 384 F.2d 348, 354, n. 12 (3 Cir.), cert. denied, 390 U.S. 1040, the court analyzed *Fleischmann* as follows:

"its reasoning seemed to turn on the fact that the Sprague rule [that attorneys' fees are recoverable] was not ' * * * developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies.' As mentioned above Section 102 is not the type of statutory cause of action that prescribes 'intricate remedies.' "

The court in *Gartner* noted that since Congress had manifested a reluctance to detail remedies, if it had decided to prohibit any specific relief, it would have so stated. "Absent this, 'appropriate relief' fairly construed must be held to include proper counsel fees" (384 F.2d at 355). Since Section 10 of the National Labor Relations Act is a broad grant of general remedial authority, not a detailed recital of specific remedies, on the Third Circuit's reasoning *Fleischmann* obviously has no application.

As a matter of logic and of precedent, the role played by the General Counsel and the Board cannot be determinative of the compensability *vel non* of the charging party and its counsel. It may well be that the charging party should receive only a nominal award unless the efforts of its counsel demonstrably contributed in some measure to the result.²⁰ Cf. *Bakery Workers v. Ratner*, *supra*. Nothing is more common than evaluating attorney fee awards on the basis of the value of an attorney's contribution to the result in the case, and, where more than one attorney or set of attorneys is involved, apportioning awards commensurate with their respective contributions. *Angoff v. Goldfine*, 270 F.2d 185 (1 Cir.); *Garrett v. McRee*, 201 F.2d 250 (10 Cir.); *Powell v. Pennsylvania R. Co.*, 267 F.2d 241 (3 Cir.).

Inasmuch as the record herein clearly demonstrates that the participation of Union counsel has been vital to proof of the case and to award of effective remedial relief, the order of the court below properly should have included reimbursement to the charging party for

²⁰ This is not to say, of course, that charging party's counsel must introduce new theories which were not in the general counsel's complaint, or present the decisive witness or analysis. It is to say that he must *demonstrate* that his services produced a *benefit*.

attorneys' fees and expenses. Even though the court of appeals rested its award only on the logical compulsion of *Tiidee*,²¹ the preceding discussion demonstrates that, even in the absence of the interim *Tiidee* decision, the court would have had no choice but to hold that, in denying this remedy, the Board had abused its discretion.

B. The Board's Refusal To Award Reimbursement of Organizational Expenses Was an Abuse of Discretion

It is equally clear that the Board's original refusal to award excess organizational expenses—i.e., the added costs of organizing and reorganizing employees occasioned by unlawful and intimidating employer resistance to unionization—was arbitrary and capricious, and, even without *Tiidee* to juxtapose against this refusal, the court below would have been required to modify the Board's order as to these expenses.

Reimbursement of such extraordinary expenses, directly caused by employer wrongdoing, is a patently appropriate remedy. So patently appropriate, in fact, that the Board could think of no way of rationalizing the denial of this remedy except by indiscriminately lumping the issue as to these expenses together with its treatment of litigation expenses, and invoking considerations of "the role of a charging party in the statutory scheme in the light of the basic principles that Board orders must be remedial not punitive, and collateral losses are not considered" (Pet. App. 38A-39A).

²¹ The court, however, perceived "obvious difficulties with [the Board's] approach, certainly in the case of an employer who appears to look upon litigation as a convenient means of delaying—and thereby perhaps avoiding—the fatal day of union recognition and collective bargaining" (Pet. App. 9A).

But the Board's asserted concerns about the prohibitions against award of punitive damages and reimbursement of collateral losses were clearly peripheral and unsound, as *Tiidee* subsequently acknowledged, leaving as the only viable remaining factor cited by the Board the weight to be assigned to the "charging party's participation in litigation" (Pet. App. 39A). The question of the importance of a charging party's participation in *litigation*, however, is totally irrelevant to the question whether a union should be reimbursed for *organizing expenses* needlessly caused by Heck's wrongful misconduct, both in unlawfully refusing to bargain and in engaging in "extensive violations of the Act which directly involved nearly every employee in the unit" (Op. App. 3a).

The Board's denial of reimbursement of excess organizing expenses, accordingly, is completely devoid of rational foundation. Since such expenses are plainly a direct consequence of Heck's unlawful conduct, and reimbursement thereof is a patently appropriate remedy, the Board's refusal of the requested enlargement of its order was a gross abuse of discretion.

CONCLUSION

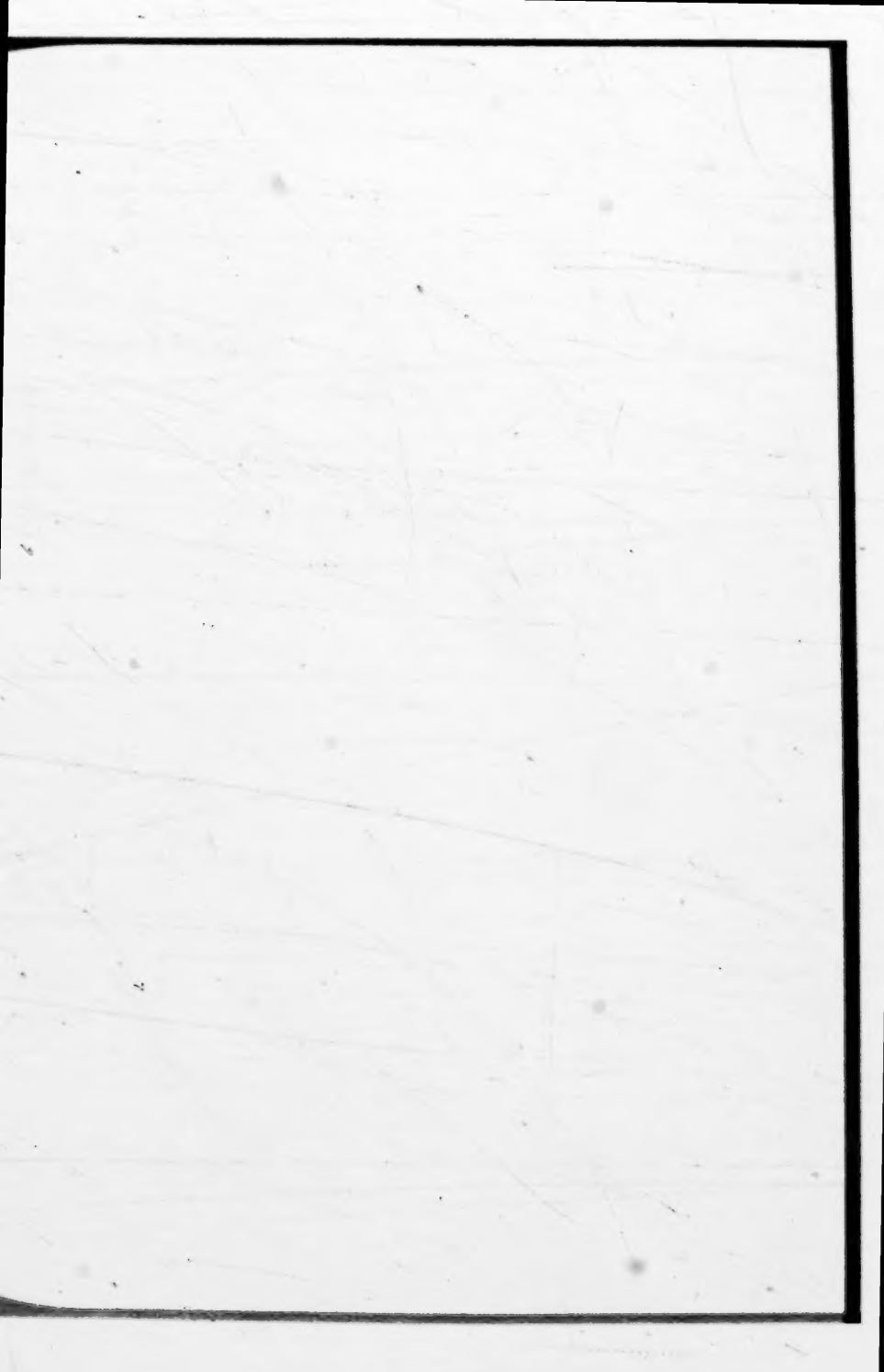
The judgment of the court below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-370

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMAL-
GAMATED MEAT CUTTERS AND BUTCHER WORK-
MEN OF NORTH AMERICA, AFL-CIO;

HECK'S, INC.,

*Respondents.*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF THE EMPLOYER, HECK'S, INC.

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TABLE OF AUTHORITIES CITED.

Cases.

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Federal Power Commission v. Idaho Power Co., 344 U. S. 17 (1952)	12
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N. L. R. B. v. Metropolitan Life Insurance Co., 308 U. S. 438 (1965)	11
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N. L. R. B. v. Ralph Printing and Lithographing Co., 433 F. 2d 1068 (CA 8, 1970)	19
National Maritime Union, 78 NLRB 971 (1948)	14
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Administration of the Labor Management Relations Act by the NLRB Subcommittee on NLRB of the House Committee on Education and Labor, 87 Cong., 1st Sess. (Comm. Print, 1961)	23
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INTEREST OF THE EMPLOYER.

The Employer, Heck's Inc., has a direct and financial interest in this proceeding. As a result of National Labor Relations Board proceedings, the Board ordered Heck's to cease committing certain unfair labor practices, but did not require Heck's to reimburse the Union for litigation or organizational expenses. Heck's did not participate in the review proceedings before the court below. Despite Heck's absence, that court enlarged the

remedy ordered by the Board and required Heck's to reimburse the Union for its litigation and organizational expenses. The Employer moved to intervene before the court below, in order to seek rehearing and there defend vital interests placed in jeopardy for the first time as a result of that court's decision. That court initially denied Heck's motion but later reconsidered its denial and granted Heck's leave to intervene. (Order filed January 25, 1974.)

Only the Employer, by advancing arguments not advanced by the Board¹ or by the Union, can adequately defend its private interests which were for the first time adversely affected by the judgment of the court below. That is, Heck's alone can adequately defend itself against the grave financial consequences first imposed upon it by that court's extraordinary reimbursement order. Accordingly, by virtue of its interest in these proceedings, Heck's requests that it be made a party before this Court.

1. In *U. A. W. v. Scofield (Fajnr Bearing Co.)*, 382 U. S. 205 (1965), and *Trbovich v. United Mine Workers of America*, 404 U. S. 528 (1972), this Court recognized that an agency with a duty to enforce both public and private rights may injure the latter while pursuing the former and that consequently private parties have a right to intervene in review or administrative proceedings to protect vital private interests. The rationale of *Scofield* and *Trbovich* is applicable to this case.

OPINIONS BELOW.

The citations to the opinions below are adequately set forth in the brief of the National Labor Relations Board.

JURISDICTION.

The jurisdictional requirements are adequately set forth in the brief of the National Labor Relations Board.

RESTATEMENT OF THE QUESTION PRESENTED.

The issue as framed by the Board is:

"Whether the court of appeals exceeded its authority as a reviewing court by substituting its judgment for that of the Board concerning the appropriate remedy for unfair labor practices." (Issue 2, Questions Presented, Board's brief)

As a part of this issue is a sub-issue concerning the Board's underlying statutory power to remedy unfair labor practices. The sub-issue that is inextricably intertwined with the issue set forth above is:

1. Whether the statute confers upon the Board the power to grant the additional remedies prescribed by the court below.

This sub-issue is in fact the real issue in this case. A resolution of this sub-issue is a prerequisite to a determination of the propriety of the judgment and remedial award of the court below. Thus, before this Court decides the issue of whether or not the court below erred in enlarging the Board's remedial order by shifting counsel and campaign costs to the employer, this Court must first reach the question as to the Board's statutory jurisdiction to award such relief in the first place. A reviewing court may enlarge an administrative agency's order and award additional relief not granted by the agency only if the agency was initially empowered by statute to grant this additional relief. That is, if the Board does not have legislative warrant to compel a violator of the Act to defray his opponent's litigation and organizational campaign expenses, a court cannot reasonably reverse the Board for failing to order this remedy. The threshold question is, therefore, whether the National Labor Relations Board has statutory jurisdiction to shift such expenses to an employer who has violated the Act.

A second sub-issue has been raised by the decision of the court below. That court inferred that the Board has statutory

power to grant wages and other fringe benefits to employees that might have accrued to them as a result of bargaining even though these benefits had not been agreed to by the employer. The sub-issue raised, then, by the suggestion of the court below is:

2. Whether the National Labor Relations Board's remedial jurisdiction includes the power to grant to employees wages and other benefits that might have accrued to them as a result of bargaining even though these benefits had not been agreed to by the employer.

This sub-issue, just as the resolution of the issue of whether the Board has power to award litigation and campaigning costs, involves a consideration of the extent of the Board's remedial jurisdiction. The inference of the court below directly contravenes this Court's mandate in *Porter*.² Therefore, it is appropriate for this Court to consider this sub-issue in order to properly guide courts and parties who will be embroiled in controversies similar to the instant case.³

2. *H. K. Porter Co. v. N. L. R. B.*, 397 U. S. 99 (1970).

3. It is respectfully requested that this brief be considered as support for the Employer's position in this proceeding and also for his position in *Heck's Inc. v. Food Store Employees Union, Local 347, etc.*, A-653, 73-559, petition for rehearing pending.

STATUTES INVOLVED.

Section 10 of the National Labor Relations Act, 29 U. S. C.
Section 160 in part provides:

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *."

"(e) The Board shall have power to petition any court of appeals of the United States * * * for the enforcement of such order * * *. Upon the filing of such petition, the court * * * shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * *"

"(f) Any person aggrieved by a final order of the Board * * * denying in whole or in part the relief sought may obtain a review of such order * * * in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * * Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction * * * to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board * * *."

STATEMENT.

In this case, the National Labor Relations Board determined that the Employer committed various acts which constituted violations of the Act and issued an order designed to rectify the Employer's conduct. The court below⁴ enforced the Board's order and then remanded the cause in order that the Board might consider additional remedies. On remand⁵ the Board granted some of the remedies requested by the Union but refused to assess upon the employer the Union's litigation and organizational costs, allegedly incurred because of the Employer's unlawful conduct. The court below⁶ reversed the Board on this aspect of its order and shifted the Union's attorney and organizational expenses to the Employer. It is against this background that the positions of the participants in this cause should be evaluated.

4. 433 F. 2d 541.

5. 191 NLRB No. 146.

6. 476 F. 2d 546 (C. A. D. C., 1973).

SUMMARY OF THE ARGUMENT.

The Employer urges that the Board itself has no statutory sanction in the first instance to shift the Union's counsel and organizational expenses to the Employer. That relief has nothing to do with making the employees whole or with securing their right to act collectively. Instead, a prescription of this relief is an exaction of damages from or an infliction of a penalty against the employer which is directly contrary to the remedial design and policy of the Act.

The Board, however, maintains that it has remedial authority to shift these union costs to an employer. Thus, while it declined here to charge the Employer for the Union's counsel and campaign costs, it nonetheless maintains that it has sole authority to determine whether or not to assess these expenses on violators of the Act.

A resolution of the issue joined by these contrary positions—whether the statute confers upon the Board the power to grant the additional remedies prescribed by the court below—is a prerequisite to determining the propriety of the judgment and award of the court below. That is, a reviewing court may enlarge an administrative agency's order and award additional relief not granted by the agency only if that agency was statutorily empowered to grant this additional relief in the first instance. Consequently, since the Board does not have legislative warrant to compel a violator of the Act to defray his opponent's litigation and organizational expenses, the court below erred when it reversed the Board for failing to order this remedy and when it assessed these expenses upon the Employer.

In addition to shifting the Union's organizational and counsel costs to the Employer, the decision of the court below may be read to suggest that the Board has remedial jurisdiction to make employees whole by granting wages and other benefits

which might have accrued to them from the bargaining process. 476 F. 2d at 553.

In Section 4 of its opinion entitled "Compensation for Lost Benefits", the court below considered the Union's request for a remedy "making its members whole for wage and other fringe benefits which might have accrued from the bargaining process" The Board in arguments before the court below indicated that "it was wholly lacking in statutory authority to give relief of this nature[, and] that, even if it had power to act, this would not be an appropriate case in which to do so." In considering the Union's request, the court below did not specifically agree that the Board lacked statutory power to award the requested relief. Consequently, the Employer submits that the failure to judicially confirm the Board's own delimitation of its remedial jurisdiction supports an inference that the court below believes that the Board possess power to award benefits which might have accrued as a result of bargaining. The import of such an inference is directly contrary to the teachings of *Porter, supra*, since an award of these benefits is equivalent to an imposition of substantive contract terms.

Rather than attempting to invade areas from which it has been Congressionally barred, and assess damages or inflict penalties upon violators of the Act, the Board should undertake to employ the remedies that do not contravene the scheme of the Act and that will fully protect employee rights. In this regard, the Board should make greater use of Section 10(j) which permits it to petition for injunctive relief in order to insulate employees from pervasive unfair labor practices.

ARGUMENT.

The Employer, as earlier stated, contends that the Board lacks statutory power to shift a union's counsel and campaign costs to an employer who has violated the Act. Consequently, the court below erred when it imposed this relief on the Employer here. This position will be fully argued in part II of this brief. In addition, if this Court disagrees and believes that the Board has power to award the challenged relief, the court below nonetheless improperly enlarged the Board's order. The facts of this case demonstrate that the Board did not abuse its discretion in selecting its relief and in fashioning its remedial order.

I.

THE COURT BELOW EXCEEDED ITS AUTHORITY BY ENLARGING THE BOARD'S CHOSEN REMEDIES.

The Board is charged with selecting the remedies which will effectuate the policies of the Act.⁷ This Court has recognized that since there is an interrelationship between the policies of the Act and the remedies selected by the Board, the Board's selection of remedies should be given great deference by reviewing courts and not lightly reversed.⁸ It follows that, if the Board possesses discretion to award the challenged remedies, it did not abuse this discretion by refusing to order such relief here.

7. 29 U. S. C. 160.

8. *Phelps Dodge Corp.*, 313 U. S. 177, 194 (1941); *Virginia Electric and Power Co. v. N. L. R. B.*, 319 U. S. 533, 539-540 (1943). As this Court has observed, agency orders may be modified by reviewing courts only "where the remedy selected has no reasonable relation to the unlawful practices found to exist". *Jacob Siegal Co. v. Federal Trade Commission*, 327 U. S. 608, 613 (1946). The jurisdiction of the reviewing court is limited to deciding "only whether under the pertinent statute and relevant facts the [agency] made 'an allowable judgment in [its] choice of remedies.'" *Butz v. Glover Livestock Commission Co.*, 411 U. S. 182, 189 (1973).

since the employer did not engage in vexacious or wanton conduct or litigate for oppressive reasons so as to justify the imposition of a penalty upon him.⁹ Rather, in the underlying administrative proceeding, he introduced substantial and pertinent defenses to the charges against him. As the Board itself concluded, the employer's defenses were not "clearly meritless on the face, [and] . . . if fully credited and given [the] broadest possible sweep, would have resulted in the rejection of sufficient [union authorization] cards to have vitiated the Union's majority claim." The substantiality of the employer's defense, that it doubted in good faith the union's majority claim, is manifested by its success in the hearing before the Administrative Law Judge. That Judge not only exonerated the employer from refusing to bargain but further stated that the employer's "reluctance to recognize the union pursuant to the latter's claim of majority based on authorization cards is certainly understandable, to say the least . . ." in view of the employer's previously successful attacks on the union's majority claim.¹⁰

Consequently, even if the Board may in its discretion punish violators of the Act, the court below did not demonstrate that the Board's failure to inflict punishment here and to grant organizational or counsel expenses was a patent abuse of its discretion or was calculated to achieve ends other than those which can be said to effectuate the purposes of the Act. Therefore, by substituting its judgment for that of the Board, the court below exceeded its power and acted inconsistently with the orderly process of judicial review. *N. L. R. B. v. Metropolitan Life Insurance Co.*, 380 U. S. 438 (1965).¹¹

9. In *Hall v. Cole*, *supra*, this Court observed that the element essential to justify the imposition of punishment is the existence of vexacious or wanton conduct on the part of the unsuccessful litigant.

10. In addition, the employer supported its defenses to Section 8(a)(1) allegations with sufficient evidence to sustain some and have others rejected on the basis of credibility resolutions.

11. Furthermore, the court below, if dissatisfied with the order of the Board, should have remanded the cause to the Board rather

II.

THE BOARD'S REMEDIAL JURISDICTION DOES NOT PERMIT IT TO ASSESS DAMAGES OR INFLICT PENALTIES UPON VIOLATORS OF THE ACT.**A. The Board Does Not Have Statutory Warrant to Require a Violator of the Act to Defray His Adversary's Litigation and Organizational Campaign Expenses.**

The Employer contends that litigation and organizational expenses properly are considered "damages" as this Court and the Board have employed that term when discussing the extent of the Board's remedial authority.¹² Accordingly, the Board has neither statutory nor judicial sanction to require an employer who has violated the Act to reimburse the Union for these costs. Moreover, the Employer further submits that even if these expenses are not viewed as damages by this Court, the Board nevertheless lacks jurisdiction to award these costs to the Union; the rationale requiring an unsuccessful party to bear these expenses is punitive and the Board cannot take punitive action against violator of the Act. In as much as the Board lacks statutory jurisdiction to assess campaign and counsel costs on the employer, the court below could not reverse the Board for failing to impose these costs. A court may modify an agency order and award relief not granted by that agency only if the agency has statutory jurisdiction to award this relief initially. Since the Board here is prohibited from awarding counsel and organizational costs, the court below could not enlarge the Board's order and award these costs.

than usurping the Board's exclusive authority to fashion remedies. In the words of this Court "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *Federal Power Commission v. Idaho Power Co.*, 344 U. S. 17, 20 (1952).

12. *Vaughan v. Atkinson*, 369 U. S. 527.

1. An Analysis of Judicial and Administrative Determinations and Legislative History Demonstrates That the Board Lacks Authority to Assess Damages Upon Violators of the Act.

(a) *The Court and Board Decisions.*

The desideratum of the labor policy underlying the Act is to secure employees in their right to act collectively for their mutual benefit. In order to implement this policy, Congress has empowered the Board to devise remedies which have a nexus with the purposes of the Act. As this Court has recognized:

"[A]n employer [who has violated the Act] may be required not only to end his unfair labor practices; he may also be directed affirmatively to recognize an organization which is found to be the duly chosen bargaining-representative of his employees; he may be ordered to cease particular methods of interference, intimidation or coercion, to stop recognizing and to disestablish a particular labor organization which he dominates or supports, to restore and make whole employees who have been discharged in violation of the Act, to give appropriate notice of his compliance with the Board's order, and otherwise to take such action as will assure to his employees the rights which the statute undertakes to safeguard."¹³

Each of these measures is remedial and therefore within the Board's statutory powers.¹⁴ However, as this Court also has recognized:

"The Labor Management Relations Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with backpay." *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656, 665 (1954).

This limitation on the Board's remedial power was highlighted in the *Republic Steel* case. There, this Court refused to enforce

13. *Republic Steel Corp. v. N. L. R. B.*, 311 U. S. 7, 12 (1940).

14. *Republic Steel Corp. v. N. L. R. B.*, *supra*.

a Board order requiring an employer to pay sums of money to third parties after having awarded compensatory backpay to his employees. In that case, the Board had directed the employer to deduct from back wages due to unlawfully discharged employees, the amounts they had received from governmental agencies that had employed them on relief projects, and to then pay the money deducted to the Government. In reaching its decision that reimbursement to third parties was not sanctioned by the Act, this Court held that such payments amounted to "an exaction neither to make the employees whole nor to assure that they can bargain collectively with their employer through representatives of their own choice." at 12-13. The challenged relief in the instant case, just as the relief in question in *Republic*, has nothing to do with making employees whole for their losses and instead is an exaction of damages that has no relation to the remedial scheme and policy of the Act. Accordingly, just as the Board may not require a violator of the Act to make up the losses that have been sustained by governmental agencies, so also the Board has no statutory power to order a violator to reimburse a union for its campaign and attorney costs.

The Board itself, prior to the instant case, has recognized that it has no general compensatory powers and may grant monetary awards only in so far as these awards make employees whole for their actual losses. In *National Maritime Union*,¹⁵ the Board rejected the employer's invitation that it assess damages upon a union which struck to compel the employer to discriminate against his employees. The Board held that even if such an award would encourage employers to resist discriminatory union demands, it was barred by Congress from assessing damages upon a violator of the Act. In reaffirming its authority to award backpay and to refund illegally exacted dues to employees, the Board stated that these awards were designed to recompense employees for their actual losses and

15. 78 NLRB 971 (1948).

therefore were consistent with the remedial scheme of the Act and within the power of the Board to grant.¹⁶

Accordingly, consistent with the expressed views of this Court and of the Board itself, the Employer urges that this Court hold that the Board has no statutory power to shift any part of the union's organization and counsel costs to an employer even though that employer violated the Act, and that therefore the court below could not award this relief to the union.

Considerable legislative history further supports the Employer's position.

(b) *Legislative History.*

The question of whether the Board has jurisdiction to require an employer to defray the litigation and organizational expenses of a union must be considered in light of the enframing circumstances of relevant legislative history. This history evinces that Congress deliberately excluded damage awards from Board's arsenal of remedies.¹⁷

The initial version of the National Labor Relations Act introduced by Senator Wagner in 1934 granted power to the Board to order persons who violated the Act

"to cease and desist from such unfair labor practice, or to take affirmative action, or to pay damages, or to reinstate employees, or to perform any other acts that will achieve substantial justice under the circumstances."¹⁸

Thereupon, the Committee on Education and Labor held hearings and struck out only the words "or to pay damages, or

16. The Board also held in *Operating Engineers, Local 513*, 145 NLRB 554 (1963), that employees were not allowed to recover backpay for time lost from work due to being physically assaulted by union agents. Similarly, in *St. Claire v. Teamsters* 515, 442 F. 2d 128 (CA 6, 1969), the Board was found not to have the power to remedy collateral injuries, such as loss of a home due to inability to pay a mortgage.

17. McGuiness, *Is the Award of Damages for Refusals to Bargain Consistent with the National Labor Policy?* 14 Wayne L. Rev. 1086 (1968). (Hereinafter, referred to as McGuiness.)

18. Cong. Rec. 3445 (1934).

to reinstate employees."¹⁹ from the remedial provisions of Senator Wagner's bill.

In 1935, Senator Wagner introduced a second bill, with a provision permitting the Board to issue

"an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, *including restitution*, as will effectuate the policies of the Act."²⁰

Thereafter, in a critical memorandum, the Senate Committee stated:

"The broad term 'restitution' is used in S. 1958 to take in the host of varied forms of reparation which the National Labor Relations Board has been making in its present decisions, to suit the needs of every individual case. An effort to substitute express language such as reinstatement, back pay, etc., necessarily results in narrowing the definition of restitution, which may include many other forms of action."²¹

The Committee then amended the remedy provision of the bill to read as it now does, empowering the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act."²²

The House approved the language of the remedial provisions of the Senate Bill, which then became law.²³

19. S. Rep. No. 1184, 73d Cong., 2d Sess. (1934) at 3. This bill died as Congress authorized the establishment of a Board to administer the National Industrial Recovery Act until June, 1935. (HRJ Res. 375, 73d Cong., 2d Sess. (1934).)

20. S. 1958 74th Cong. 1st Sess. (1935).

21. Senate Comm. on Education and Labor, 74th Cong., 1st Sess., Memorandum comparing S. 1958 as a substitute for S. 2926, 34 (Comm. Print 1935).

22. S. Rep. No. 573, 74th Cong., 1st Sess. 15 (1935). The Senate Report did not further explain the reason for amending the Wagner Bill. McGuiness, *supra*, n. 38, at 1092.

23. The initial House bill adopted the damage provision of the Senate bill; (H. R. 8423, 73d Cong., 2nd Sess., Section 205(c) 1934); later versions adopted the restitution provision contained in S. 1958. (H. R. 6187, 74th Cong., 1st Sess., Sec. 10(d) (1935);

In addition to the foregoing, there are further manifestations of Congressional resolve²⁴ not to permit the Board to bestow damages or the less severe remedy of restitution on successful litigants before that agency. Senator Taft who sponsored Section 303²⁵ which provides for a damage remedy in Federal District Court commented that this additional and not previously available relief was needed in as much as parties could not bring a suit for damages in the Board. He explained that the authority to award damages was accorded to courts rather than to the Board because

"it is not felt, I think, by any of those on the other side of these questions that the Labor Board is an effective tribunal for the purpose of trying to assess damages in such a case. I do not think anyone felt that that particular function should be in the Board."²⁶

It is thus indisputable that the Board's remedial jurisdiction does not embrace the power to grant damages to successful contestants in suits before that agency; accordingly the Board has no jurisdiction to require an employer who has committed an unfair labor practice to bear the union's counsel or campaign expenses, and a reviewing court may not enlarge the Board's remedial order and order this reimbursement.

H. R. 6288, 74th Cong., 1st Sess., Sec. 10(d)) Still later, the House adopted the final Senate version. H. R. 7978, 74th Cong., 1st Sess., Sec. 10(c) (1935). H. R. Res. 263, 74th Cong., 1st Sess., 79 Cong. Rec. 9731 (1935). See McGuiness, *supra* n. 40, at 1093.

24. The Senate and House aimed a substantial amount of criticism at the word "restitution" as it appeared in early versions of the bills. See, e.g., Hearings on S. 1958 Before the Senate Comm. on Education and Labor, 74th Cong., 1st Sess., pt. 2, at 244, 448, 672, 750, 846-48, 850-51 (1935); Hearings on H. R. 6288 Before the House Comm. on Labor 74th Cong., 1st Sess., 284-85 (1935). McGuiness, *supra*, n. 42, at 1093.

25. 29 U. S. C. Sec. 187.

26. 93 Cong. Rec. 4858 (1947).

2. The Board Is Statutorily Prohibited from Inflicting Penalties Upon a Violator of the Act.

Whether or not an award of counsel and organizational costs is considered to be "damages", the Board's asserted power to shift these costs can be justified only if it is authorized to inflict penalties, since payments to the union are wholly unrelated to making employees whole and only punish the employer.²⁷ The Board may impose penalties upon violators of the Act only if it is specifically authorized to do so by the Act.²⁸ However, an analysis of the Act discloses that the Board is not authorized to shift campaign or attorney expenses from the successful to the unsuccessful litigant. In as much as the authority to award attorney's fees has been conferred upon other agencies by statute,²⁹ it is apparent that Congress deliberately chose not to permit the Board to assess these costs upon a violator of the Act.

Furthermore, this Court has expressly interdicted the Board from assessing penalties upon persons who have committed

27. *Hall v. Cole*, 412 U. S. 1 (1973). The rationale underpinning the assessment of the union's litigation expenses upon an employer can be only the determination to punish him for his alleged vexacious or wanton conduct. The identical reason must be advanced to support the imposition of the union's campaign expenses upon an employer, since neither counsel nor organizational costs are proximately related to securing the statutory rights of employees to be compensated for their actual losses or to engage in collective action.

28. Although, as this Court has observed, Federal courts may exercise their equitable power, in the absence of express statutory authorization, and award litigation costs when the interests of justice so require, this inherent authority does not extend to administrative agencies such as the Board. Rather, the Board is a statutory creation and may employ only those powers specifically accorded to it by Congress. See, 1 Am. Jur. 2d, Administrative Law, Section 72; *H. K. Porter v. N. L. R. B.*, 397 U. S. 99 (1970).

29. See, e.g., Clayton Act, Sec. 4, 38 Stat. 731, 14 U. S. C. Sec. 15; Communications Act of 1934, Sec. 206, 48 Stat. 1072, 47 U. S. C. Sec. 206; Interstate Commerce Act, Sec. 16, 34 Stat. 590, 49 U. S. C. Sec. 16(2); Securities Exchange Act of 1934, Secs. 9(e), 18(a), 48 Stat. 890, 897, 15 U. S. C. Secs. 78i(e), 78r(a).

unfair labor practices, even if the infliction of such punitive relief would foster the policies of the Act. In the words of this Court:

"We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties of fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive." *Republic Steel Corp. v. N. L. R. B.*, *supra* at 11-12.³⁰

From the foregoing it is apparent that the Board has no statutory or judicial warrant to fix a penalty on the employer here, whether that penalty is designed to rectify the employer's past unfair labor practices or to discourage illegal conduct in the future.³¹

30. To the same effect is *Carpenters Local 60 v. N. L. R. B.*, 365 U. S. 651 (1961).

31. The Board's assertion of power to award litigation expenses also abuts against the established judicial principle that "attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefore." *Fleischmann Corp. v. Maier Brewing Co.*, 386 U. S. 714, 717 (1967). The importance of defining the limits of the Board's power in this remedial area cannot be overstated. The jurisdiction of the Board to award litigation and organization costs is an issue which will frequently arise. Indeed, in *Tiidee Products, Inc. v. N. L. R. B. and International Union of Electrical, Radio and Machine Workers, AFL-CIO*, petition for writ of certiorari before judgment pending, the Board implemented its asserted power and shifted the union's attorney's fees to the employer. Prior to *Tiidee* an assessment of counsel costs in Board administrative proceedings was restricted to contempt proceedings brought against persons who deliberately violated court decrees enforcing Board orders; even in these situations, reimbursement of Board attorney fees was often not required. See, e.g., *N. L. R. B. v. Stafford Trucking Inc.* (not officially published), 77 LRRM 2468 (CA 7, 1971); *N. L. R. B. v. Ralph Printing and Lithographing Co.*, 433 F. 2d 1068 (CA 8, 1970). In determining whether to grant extraordinary penalties the Board now appears to be distinguishing between frivolous (*Tiidee Products, Inc.*, 194 NLRB 1234 at 1236)

B. The Board Does Not Have Statutory Jurisdiction to Award Wages and Other Benefits That Might Have Accrued as a Result of Bargaining in the Absence of Agreement by the Employer to the Institution of These Conditions of Employment.

It is implicit in the opinion of the court below that the Board has statutory power to bestow upon employees, as a remedy to cure unfair labor practices, wages and fringe benefits that might have accrued to these employees as a result of bargaining, even though these benefits had not been agreed to by the employer. In the Employer's view, such relief is barred by this Court's decision in *H. K. Porter*, 379 U. S. 99 (1970). In *Porter*, this Court held that the Board could not require an employer to accept a union dues check-off provision in his labor contract, even though the employer had willfully and steadfastly refused to negotiate in good faith about this clause.

There is no distinction between the relief barred by *Porter* and the remedy that the court below suggests that the Board has power to impose. In either case, the employer has not agreed to the wages and other employment conditions which are imposed upon him and for which he is as fully responsible as if he had agreed to them. Then, too, though the award may be dubbed "compensation for lost benefits" (as it is in the court below), the payment to employees is equal exactly to the benefits that would be produced by the retroactive imposition of contract terms. Since the major premise of *Porter* is that the Board may not dictate the substantive terms of employment that will govern the bargaining relationship of the parties, it is logically immaterial

and debatable defenses (the instant proceeding). Such a distinction is itself untenable. No litigant should be balked from vigorously pursuing a position in which he honestly believes, however devoid of merit it may be, by the threat that his opponents' various costs will be assessed upon him if he loses. Consequently, the employer urges that this Court specifically delimit the Board's remedial powers to the confines established by Congress and prohibit it from exacting union counsel and campaign expenses from an employer.

whether these terms are to be applied retroactively or prospectively. Furthermore, whether contract terms are to be prospectively or retrospectively applied the Board cannot accurately gauge the benefits the employees would have achieved as a result of free negotiations.³² Consequently, artificially implanted employment conditions whether applied retroactively or prospectively may exacerbate the already deteriorated relations between the parties and may well dislocate the very bargaining relationship that the Act was intended to foster. Moreover, retroactively imposed contract terms under the guise of "compensation" will inevitably serve as a floor from which bargaining for subsequent contracts will begin, thereby reinforcing the initial governmental infringement on the collective bargaining process. Accordingly, this Court should reverse the decision of the court below insofar as it implies that the Board has power to remedy unfair labor practices by awarding wages and other benefits that the union had sought but had been unable to secure from the employer because the latter refused to agree to the inclusion of these conditions in a contract.

C. The Board's Arsenal of Remedies Includes Injunctive Relief Which Amply Protects Employee Rights.

While the assessment of a union's counsel and campaign costs upon an employer is beyond the Board's statutory remedial powers, the Board has weapons which do not contravene the remedial design of the Act and which fully protect the rights of employees. For example, Section 10(j) of the Act permits the Board to petition for injunctive relief in order to insulate employees from pervasive unfair labor practices. The legislative history of Section 10(j) demonstrates that this provision was intended to prevent persons from

32. As this Court observed in *Porter*:

"It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strength of the parties." at 107-108.

"violating the Act to accomplish their unlawful objectives before being placed under any legal restrictions and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation."³³

Thus, injunctive relief under 10(j) coming virtually at the time of the asserted violation will protect employee rights during the ensuing and sometimes protracted administrative process. Greater reliance on Section 10(j) injunctive relief has produced several salutary results particularly in the cases involving organizational campaigns.³⁴

On the other hand, the challenged monetary remedies assessed upon this employer by the court below do not provide compensation or any other relief for the affected employees. Rather, these remedies serve only to penalize this employer for urging plausible defenses to the charges against him. Moreover, it has been said that the Board's principle remedial problem is delay;³⁵ it cannot be doubted that a Board remedy, to be effective, must be awarded with dispatch in order that the cause be promptly disposed of. If the Board is empowered to shift counsel or campaign costs this will considerably prolong the administrative proceeding since collateral hearings and discovery procedures will be necessary to determine the proportion of the union expenses that the employer must bear.

The beneficial effects on employee rights from the utilization of Section 10(j) are patent; the fact that the Board has sparingly employed³⁶ this provision provides no justification for it to usurp

33. S. Rep. No. 105 80th Cong. 1st Sess. 27 (1947).

34. Employees who may have been illegally discharged can be promptly returned to their employment. This immediate reinstatement is often the key to preserving employee rights during organizational campaigns because it greatly reduces the apprehension caused by the discharges among the remaining employees.

35. Advisory Panel on Labor-Management Relations Law, Organization and Procedure of the National Labor Relations Board, S. Doc. 80, 86th Cong. 2d Sess. 2 (1960).

36. According to the 1971 Annual Report of the Board, that agency initiated sixteen 10(j) proceedings during fiscal year 1971.

power deprived by Congress and to fix penalties or damages on employers well after the time that their conduct that was found to violate the Act has occurred. The Board should be preoccupied with exploring the effective means to secure employee rights which are at hand, rather than invading areas restricted from it by Congress and asserting powers which it does not possess.³⁷

Of this sixteen, eight were successful in procuring an injunction, three were settled, only three were denied or dismissed, and two were pending at the conclusion of the fiscal year. During fiscal year 1972, the Board proceeded on twenty-one 10(j) injunctive proceedings. It procured an injunction in eleven of these proceedings, three were settled, one was withdrawn, and only three were denied or dismissed. Three were pending at the conclusion of the fiscal year. National Labor Relations Board Annual Report 1972. It would appear that the Board's batting average in 10(j) proceedings would encourage it to utilize this remedy more frequently.

37. It appears that Congress believes that the Board's remedial jurisdiction is sufficient to effectuate the Act's policies. While Congress has encouraged the use of Section 10(j) by the Board (Role of Federal Government in Labor Relations 49 LRRM 74, 81-83 (1962)) the Board has not been authorized to inflict punishment or assess damages upon even recalcitrant parties. See, e.g., *Administration of the Labor-Management Relations Act by the NLRB*, Subcommittee on NLRB (Pucinski, Chairman) of the House Committee on Education and Labor, 87th Cong., 1st Sess. (Comm. Print, 1961). The question of expanding the Board's remedial jurisdiction has been often considered. See, e.g., *Hearings on H. R. 11725 Before the Special Subcomm. on NLRB of the House Comm. on Edc. and Labor*, 87th Cong., 1st Sess. (1961). Numerous Legislative proposals including those suggesting procedural reforms and that the Board be allowed to impose punitive damages have been advanced. See 107 Cong. Rec. 13,078 (1961), and H. R. 11,725, 90th Cong., 1st Sess. Section 3 (1968). Congress has had repeated opportunities to allow the Board to assess damages or impose penalties upon unsuccessful litigants. It is apparent that Congress has consciously chosen not to extend the Board's remedial powers in those directions.

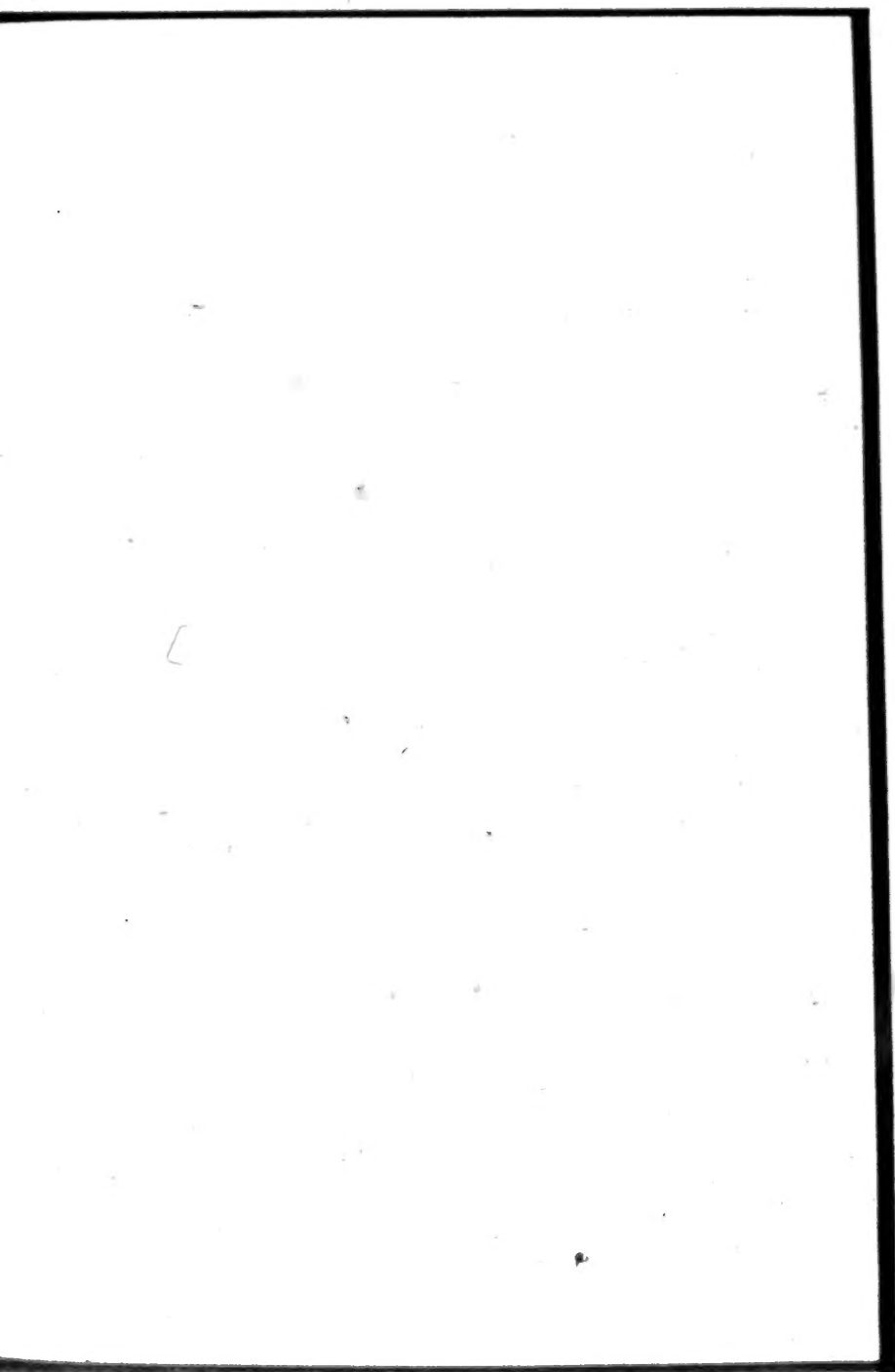
CONCLUSION.

The Employer urges that this Court adopt the views of the Employer and accordingly reverse the Judgment of the Court below.

Respectfully submitted,

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MOTION
MAR 12 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-370

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMAL-
GAMATED MEAT CUTTERS AND BUTCHER WORK-
MEN OF NORTH AMERICA, AFL-CIO;

and

HECK'S, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**MOTION OF THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA FOR LEAVE
TO FILE BRIEF AMICUS CURIAE IN
SUPPORT OF HECK'S, INC.**

and

**BRIEF AMICUS CURIAE ON BEHALF OF THE CHAM-
BER OF COMMERCE OF THE UNITED STATES
OF AMERICA IN SUPPORT OF HECK'S, INC.**

MILTON A. SMITH
General Counsel

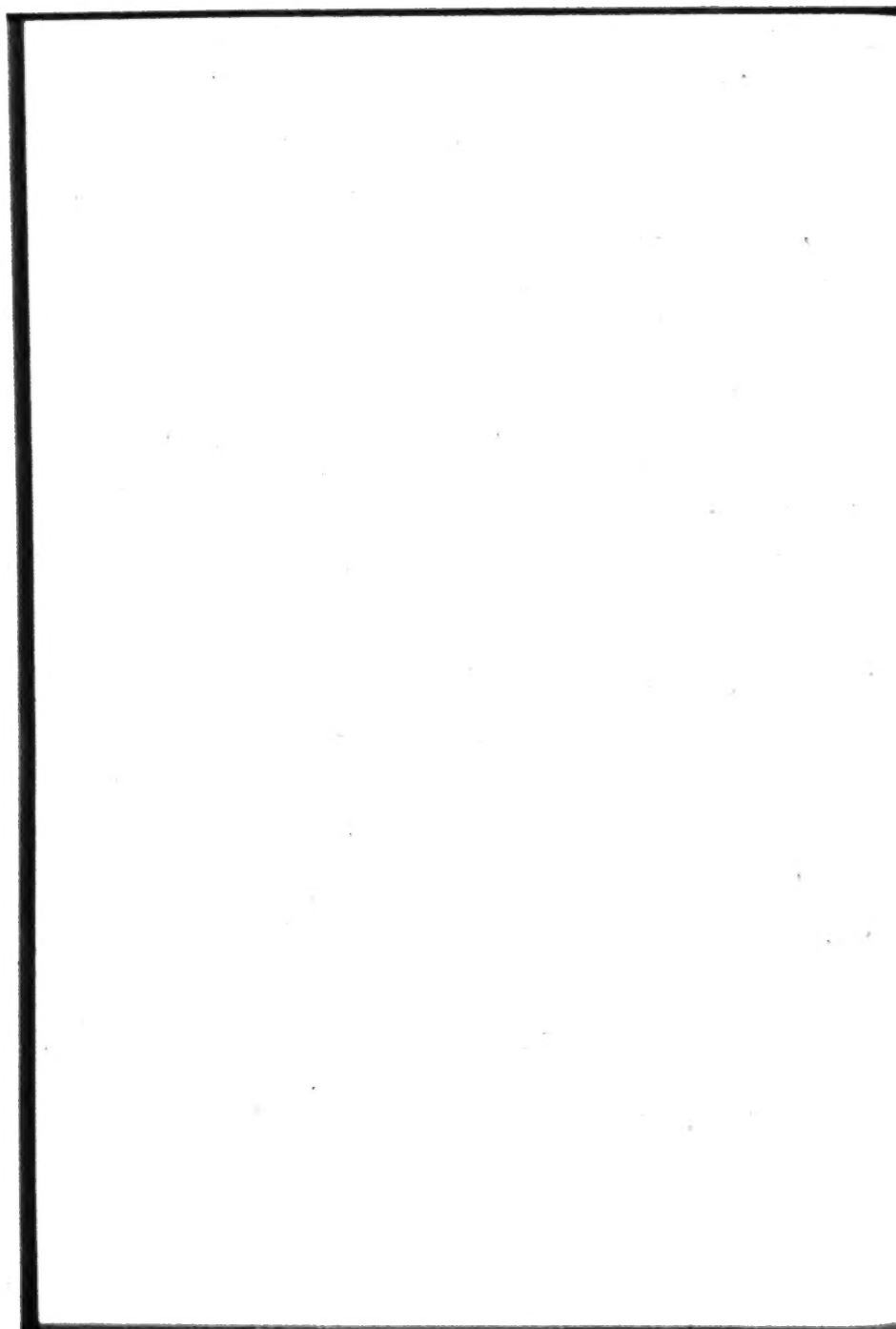
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UNITED STATES OF AMERICA FOR LEAVE
TO FILE BRIEF AMICUS CURIAE IN
SUPPORT OF HECK'S, INC.**

The Chamber of Commerce of the United States of America respectfully requests leave to file a brief *amicus curiae* in support of the position of Heck's, Inc. In support of this motion the Chamber states:

1. The Chamber is a federation of more than 3,700 state and local chambers of commerce and trade associations, with an underlying membership of more than 5,000,000 business firms. It is the largest association of business and professional organizations in the United States.

2. One of the questions presented in this case—the critical question in the Chamber's view—is whether the Board has the power to assess litigation expenses and organizational costs to an unsuccessful respondent in a Board proceeding. Because many of the Chamber's members might be subject to substantial attorneys' fees and organizational costs under the decision of the court below, the propriety of the Board or a court assessing such costs is a matter of substantial concern to the Chamber.

3. The Chamber, in support of Heck's, Inc., urges a different theory than that presented by the Board and the Union who are primarily concerned with the relationship between the Board and the Courts of Appeal. The Chamber, unlike the Board and the Union, submits that *neither* the Board nor the courts have the power, under the National Labor Relations Act, to require an unsuccessful party in any Board proceeding to reimburse either the Board or another party for their litigational expenses. Accordingly, the practice of granting such a remedy, commenced by the Board in *Tiidee Products*, 194 NLRB 1234 (pet. rev. pend. D. C. Cir.), and reasserted by the court below in this case, must now be halted.

4. The questions at issue here thus transcend the interest of the particular parties involved. In similar circumstances this Court has permitted the Chamber to file briefs *amicus curiae*. See, e.g., *N. L. R. B. v. H. K. Porter*, 397 U. S. 99 (1970); and *Griggs v. Duke Power Company*, 401 U. S. 424 (1971).

The instant matters are of equal importance to employers across the nation. For these reasons, the Chamber respectfully requests leave to present its views.¹

Respectfully submitted,

MILTON A. SMITH
General Counsel

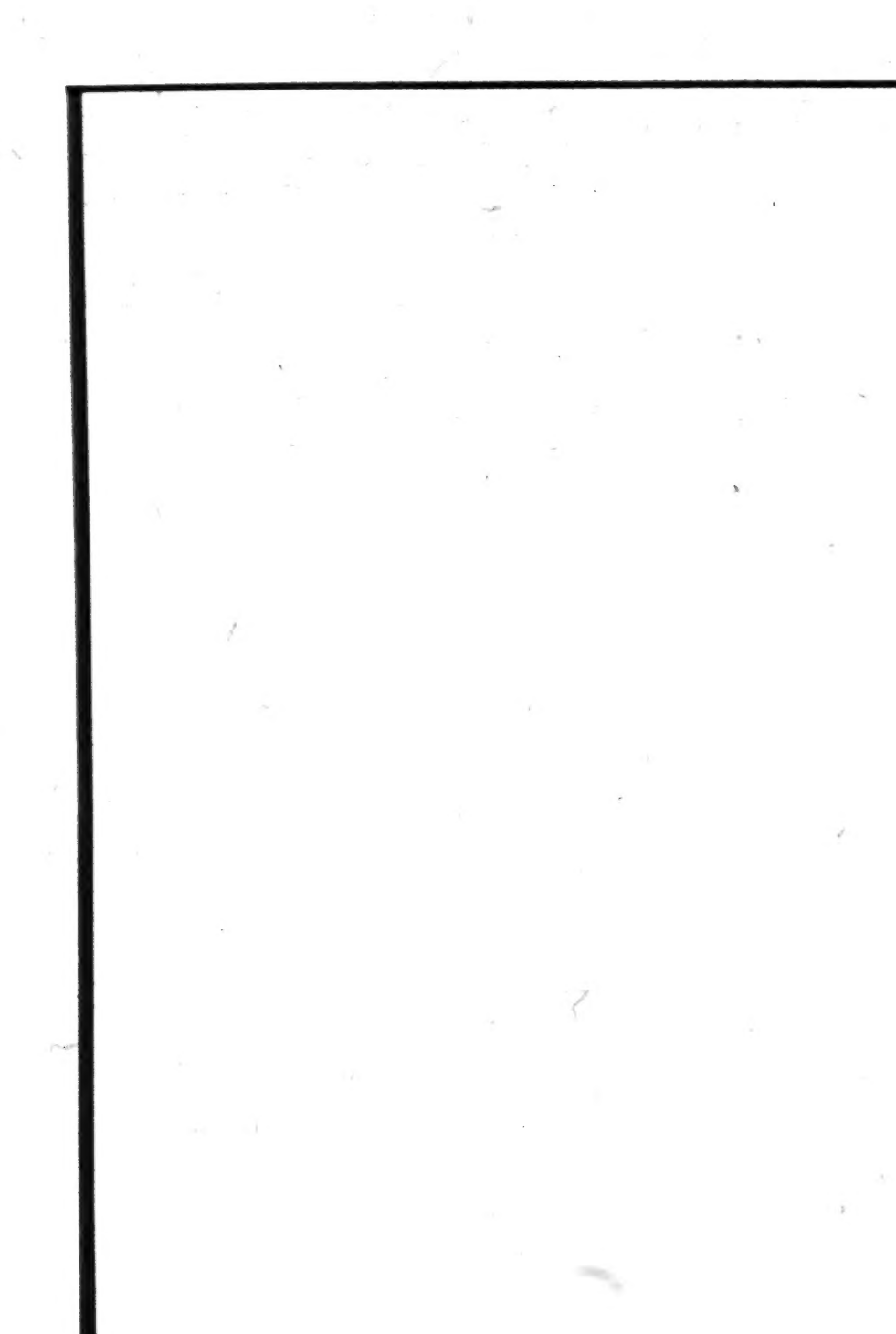
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1. The Chamber regrets that this brief must be submitted so near oral argument. This delay, however, was unavoidable; Heck's was not granted intervention, and hence the right to file a brief, until January 25, 1974 and did not submit its brief for filing until March 4, 1974. The Chamber, in order to support the position of Heck's, had to assess Heck's brief before it could submit its own.



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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF AMICUS CURIAE ON BEHALF OF THE CHAM-
BER OF COMMERCE OF THE UNITED STATES
OF AMERICA IN SUPPORT OF HECK'S, INC.**

This brief *amicus curiae* on behalf of The Chamber of
Commerce of the United States of America is filed contingent
upon the Court's granting the foregoing motion for leave to file
a brief *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

The interest of the Chamber is set forth in its annexed motion
for leave to file a brief *amicus curiae*.

ARGUMENT

1. Both the Board and the Courts are statutorily limited by the Act in the remedies which they may prescribe. The threshold question in the case, accordingly, is whether the Act allows the Board, in the first instance, to grant a reimbursement, to either the Board and/or a charging party, of litigation expenses or additional organizational costs. For it follows *a fortiori* that, if the Board is so limited, the Act likewise limits the courts from granting such relief. The question of the appropriate tribunal to grant such a remedy—the primary question presented by the Board and the Union—is academic when, as Heck's and the Chamber contend, neither tribunal has such power under the Act. This Court has repeatedly emphasized that the Act, and not the Board or the courts, is the ultimate limiting factor in determining what remedies can be meted out by the Board in correcting unfair labor practices. As this Court cautioned in *Nathanson v. N. L. R. B.*, 344 U. S. 25, 29 (1952), in overruling a Court of Appeals' decision approving the Board's determination that the Act permitted back pay claims to be given priority in bankruptcy proceedings, "[W]hether that should be done is a legislative decision".¹

2. Unlike the federal courts, the Board has no inherent equitable powers; the Board, like other administrative agencies, is "entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do." *C. A. B. v. Delta Air Lines*, 367 U. S. 316 (1961).

This Court has repeatedly emphasized that punitive relief, such as that imposed by the court below, is ". . . clearly not granted to the Board by the Federal Acts." *International Union*,

1. See also *H. K. Porter v. N. L. R. B.*, 397 U. S. 99 (1970); *Switchmens Union of North America v. National Mediation Board*, 320 U. S. 297, 301 (1943); and *Commissioner v. Brown*, 380 U. S. 563, 579 (1964).

U. A. W. v. Russell, 356 U. S. 634, 646 (1958); *Republic Steel Corporation v. N. L. R. B.*, 311 U. S. 7, 10-12 (1940). To the contrary, remedies imposed by the Board must be remedial in nature. See Morris, *The Developing Labor Law*, Bureau of National Affairs, Inc. (Washington, D. C. 1971), p. 844. Furthermore, the Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with backpay. *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656, 605 (1954). Accordingly, those persons seeking full compensatory relief must look elsewhere "since such items of recovery are beyond the scope of present board remedial orders." *U. A. W. v. Russell*, at 646.²

Attorneys' fees and organizational costs must be considered punitive and collateral and beyond the Board's powers. Such relief will not make employees whole for any losses they have suffered. Inasmuch as such relief will be discriminatorily handed out, it can only be regarded as punishment to the respondent in those cases where the Board or the courts are of the opinion that the respondent has engaged, as found here by the court below, in "clearly aggravated or pervasive misconduct" and "flagrant repetition of conduct previously found unlawful." *Food Store Employees Union Local No. 347 v. N. L. R. B.*, 476 F. 2d 546, 551 (D. C. Cir. 1973). Since such relief will issue to deter future conduct, and not to make employees whole for any losses they have suffered, organizational costs and litigation

2. Thus, in *Operating Engineers Local 513*, 145 NLRB 554 (1963), the Board denied backpay to employees for lost work time caused by the physical assault of union agents, and in *St. Clair v. Teamsters Local 515*, 442 F. 2d 128 (6th Cir. 1969), collateral injuries, such as the loss of a home for inability to make mortgage payments, were deemed beyond the Board's remedial powers. An employer's business losses occasioned by unlawful strikes or picketing would also be denied in an unfair labor practice proceeding. In short, "collateral losses are not considered in framing a reimbursement order." *Republic Steel Corp. v. N. L. R. B.*, 311 U. S. 7, 11-12 (1940).

expenses must, it is submitted, be considered punitive and beyond the Board's powers.

3. The power to order the reimbursement of litigation expenses cannot be implied. It must be grounded on the express language of the law. *Fleishmann Corporation v. Maier Brewing Co.*, 386 U. S. 714, 720 (1967). The National Labor Relations Act, however, contains no such express provision, as exists under a variety of federal regulatory laws,³ including those in the field of labor relations,⁴ nor even a provision as in *Fleishmann* providing for the "costs of the action" which, notwithstanding the "deliberate" and "willful" violations there involved, was deemed insufficient to permit such an award. Indeed, an analysis of the legislative history of both the Wagner and Taft-Hartley Acts indicates that Congress squarely faced the question of damage awards and concluded that such a remedy was inappropriate to Board proceedings.⁵ It must be

3. See, e.g., Clayton Act, § 4, 15 U. S. C. § 15; Communications Act of 1934, § 206, 47 U. S. C. § 206; Copyright Act, 17 U. S. C. § 116; Interstate Commerce Act, § 16, 49 U. S. C. § 16(2); Packers and Stockyards Act, § 309(f), 7 U. S. C. § 210(f); Perishable Agricultural Commodities Act, § 7(b), 7 U. S. C. § 499g(b); Securities Act of 1933, § 11(e), 15 U. S. C. § 77k(e); Securities Exchange Act of 1934, §§ 9(e), 18(a), 15 U. S. C. §§ 78i(e), 78r(a); Servicemen's Readjustment Act, 38 U. S. C. § 1822(b); and Trust Indenture Act, §§ 323(a), 53 Stat. 1176, 15 U. S. C. § 77www(a).

4. See, e.g., Civil Rights Act of 1964, as amended, §§ 706(k), 42 U. S. C. 2000e-5(k); Fair Labor Standards Act §§ 16(b), 29 U. S. C. §§ 216(b); Railway Labor Act, § 3(p) 45 U. S. C. § 153(p). Significantly, even the substantially stronger language of Section 303 of the Labor Act, which allows any person injured by an unlawful secondary boycott to "recover the damages by him sustained and the cost of the suit" (emphasis added), has been consistently construed as not authorizing the prevailing party to recover attorneys fees. See, e.g., *Teamsters Local 20 v. Morton*, 377 U. S. 252, 260, n. 16 (1964).

5. Thus a specific provision permitting the Board to order violators to "pay damages", found in the Taft-Hartley Act as originally introduced (S. 2926, 73d Cong., 2d Sess.; 1 Leg. Hist. of the Taft-Hartley Act, pp. 6-7), and an even milder provision allowing "restitution" (1 Leg. Hist. 2465), were later deleted follow-

presumed, therefore, that had Congress intended to confer upon the Board or courts the extraordinary powers here involved, such powers would have expressly been granted as in the case of other agencies⁶ or as in the case of federal appellate litigation.⁷ "It may well be true," as this Court observed of a similarly broad reading of the Board's remedial powers in *H. K. Porter v. N. L. R. B.*, 399 U. S. 99 (1970), "that the present remedial powers are insufficiently broad to cope with important labor problems," but, "it is the job of Congress, not the Board or the Courts . . ." to correct such alleged deficiencies.

4. In *Hall v. Cole*, 412 U. S. 1, 5, n. 7 (1973), this Court upheld the award of attorneys' fees to a private litigant in a suit under § 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 412. This Court indicated, however, that, absent a controlling statute or contract, such an award is permissible only where (a) it seeks to punish contemptuous conduct; (b) it confers "a substantial benefit on the members of an ascertainable class . . ." (*Mills v. Electric Auto Lite Co.*, 396 U. S. 375, 393-394) or (c) possibly where the plaintiff is acting as a "private attorney general." None of

ing extensive hearings in both the House and Senate. The final version of the bill, as reported by both Congressional committees, only authorized the Board " . . . to take such affirmative action, including reinstatement with or without backpay as will effectuate the policies of this Act." S. 1958, as reported, 2nd Sen. Print, II Leg. Hist. 2292; H. R. 7978, as reported, 2nd House Print, II Leg. Hist. 2905; see also, H. Cont. Rep. No. S10 at 54, 80th Cong., 1st Sess., II Leg. Hist. 2931. Similarly, in considering a proposal to give the Board authority to assess damages for breach of collective bargaining agreements or in secondary boycott cases under the Taft-Hartley amendments, the chief sponsor of the bill, Senator Taft, noted that there then existed "no possibility of a suit for damages" under the Board's extant powers. 93 Cong. Rec. 4858 (1947). Congress determined, however, that even the authority to assess limited damages should be lodged only in the courts under Sections 301 and 303 of the Act.

6. See notes 3 and 4, *supra*.

7. See, e.g., 28 U. S. C. § 1912 permitting federal courts of appeals or this Court to assess single or double damages against the losing party.

these considerations are present in this case. There is, here no contemptable conduct, common fund or class within the meaning of *Mills*, no "private attorney general" nor need to encourage private litigation to vindicate public rights. There is no basis, in sum, to apply any of the "limited exceptions" to the general rule disfavoring the award of attorneys' fees. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U. S. at 717-718; *Hall v. Cole*, 412 U. S. at 5.⁸

CONCLUSION.

WHEREFORE, for all of the foregoing reasons, as well as those set forth in the brief for Heck's, the Chamber respectfully submits that the decision below must be reversed.

Respectfully submitted,

MILTON A. SMITH
General Counsel

RICHARD B. BERMAN
Labor Relations Counsel

THE CHAMBER OF
COMMERCE OF THE
UNITED STATES OF
AMERICA

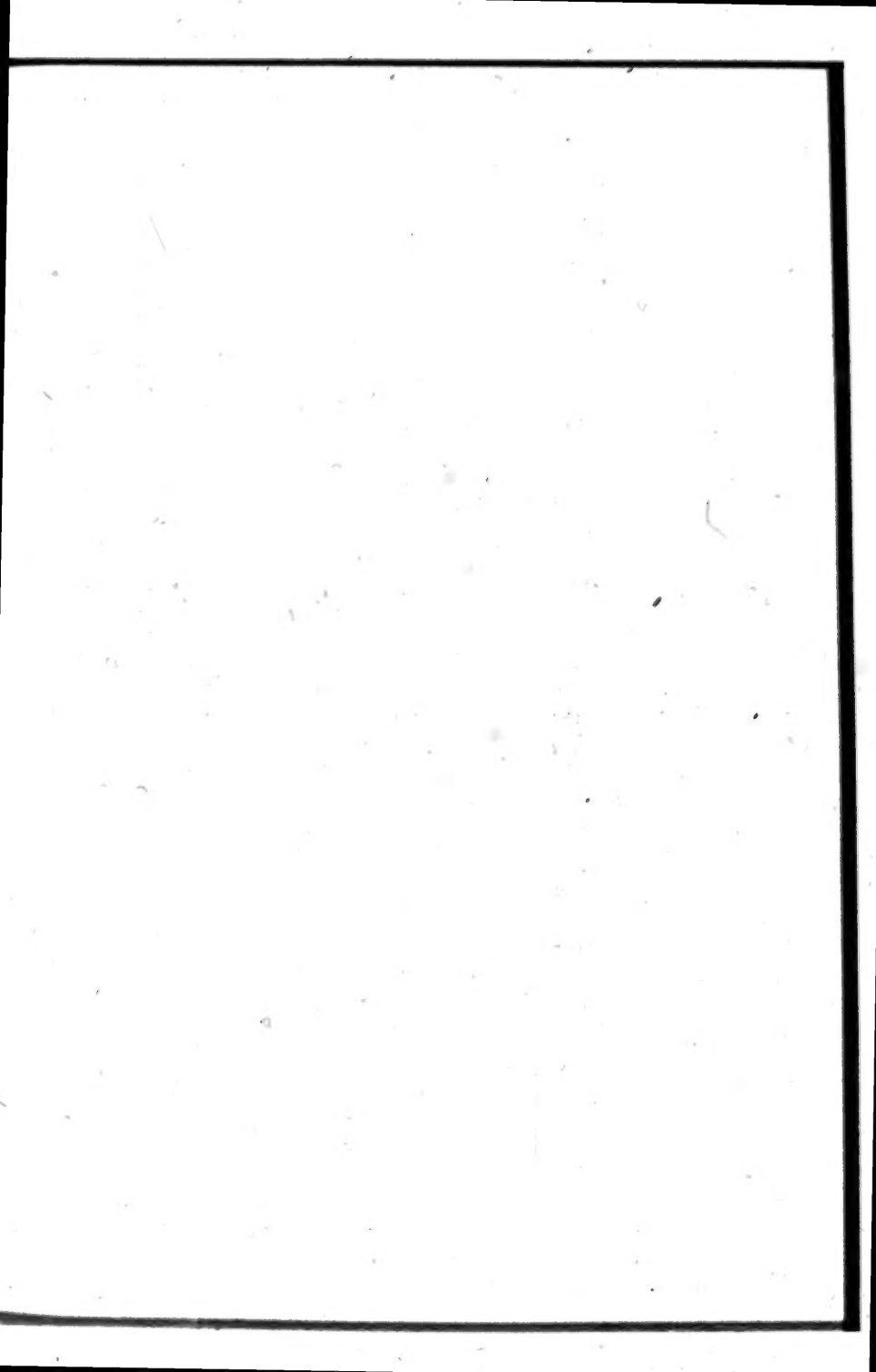
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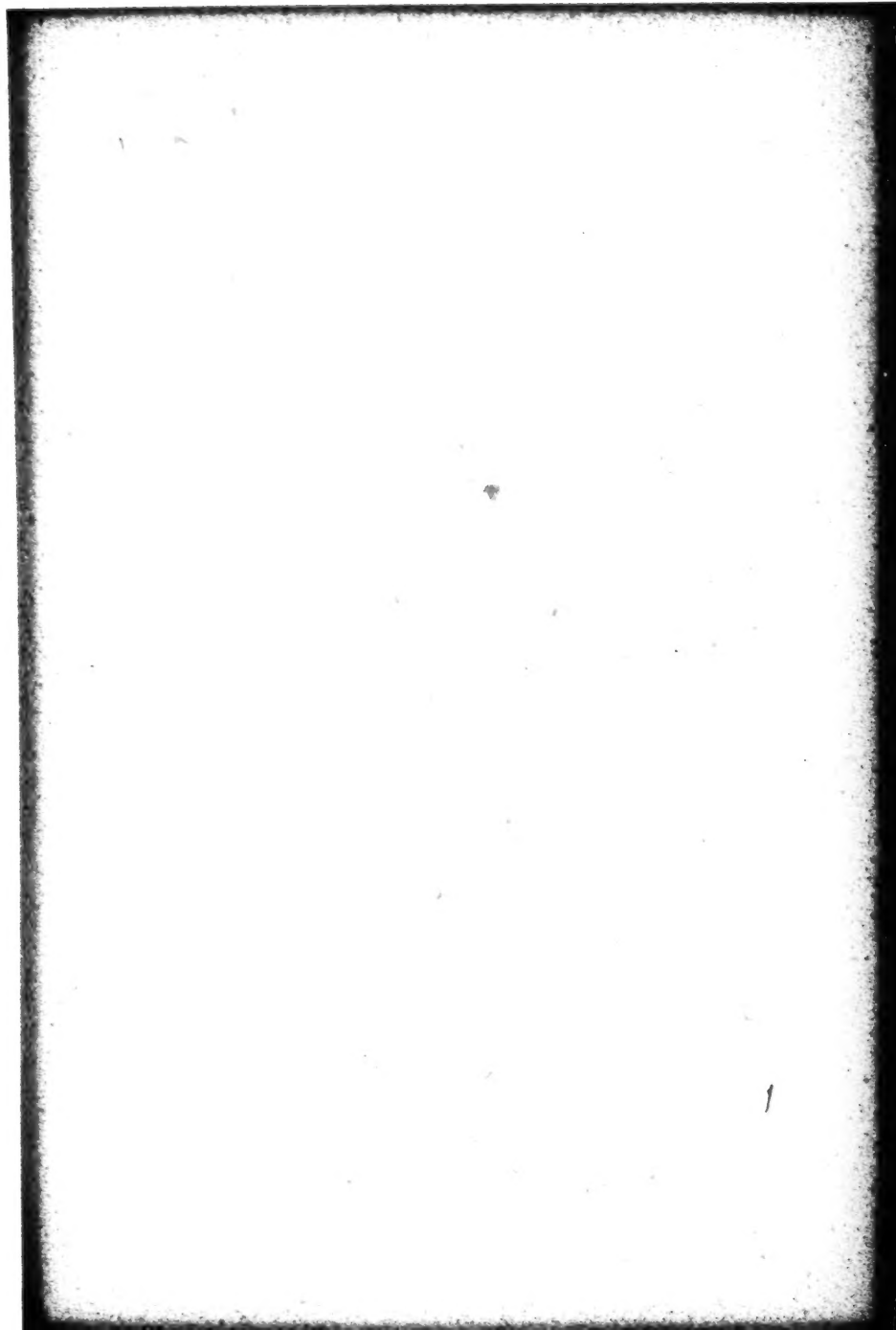
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8. For many of the same valid reasons that preclude the Board from awarding attorneys' fees, the Board is likewise precluded from awarding the reimbursement of organizational expenses. In addition, such an award would be pure conjecture because there is no way of adequately assessing the effect of the Company's practices on the employees sought to be organized. Hence, such an award might unjustly foist upon the Company the organizational business expenses of the Union.





In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-370

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**FOOD STORE EMPLOYEES UNION, LOCAL 347,
AMALGAMATED MEAT CUTTERS AND BUTCHER
WORKMEN OF NORTH AMERICA, AFL-CIO**

**ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

**SUPPLEMENTAL BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

This supplemental brief is filed in response to the brief filed by the employer, Heck's, Inc., which argues that the Board has no authority to award litigation and organizational expenses.¹ That issue

¹ The same contention is made in the petition for certiorari before judgment in the court of appeals in *Tüdee Products, Inc. v. National Labor Relations Board*, No. 73-1180.

was not raised before or decided by the court of appeals, and neither the Board nor the Union has raised it in this Court.

We submit that (1) this issue is not properly before the Court and (2) that, in any event, the Board has authority to award litigation and organizational expenses.

I

Although Heck's was the charging party before the Board, it did not participate in the court of appeals proceeding. The Board and the Union, who were the only parties conducting the litigation there, assumed that the Board has power to award litigation and organizational expenses, and merely litigated the propriety of the Board's refusal to exercise that power in this case.

After the court of appeals rendered its decision directing the Board to grant that relief, Heck's sought to intervene in that court in order to raise the issue of Board power. The court of appeals denied intervention. Heck's then filed a petition for certiorari challenging the denial of intervention, and also arguing that the Board had no power to award attorney's fees and organizational expenses. *Heck's, Inc. v. Food Store Employees Union, Local 347, etc.*, No. 73-559. Alternatively, Heck's moved to intervene in the present case (No. 73-370), which was pending on the Board's petition for certiorari. On December 3, 1973, the Court denied Heck's petition in No. 73-559, granted the Board's petition in No. 73-370, and denied Heck's motion to intervene in that case.

On January 25, 1974, however, the court of appeals on Heck's motion reconsidered its prior denial and granted Heck's intervention. Heck's then sought reconsideration of this Court's denial of Heck's petition in No. 73-559. The Court denied that request on March 4, 1974. Heck's then filed its brief in the present case, which seeks to raise the same issue the Court twice has declined to consider.

The theory upon which Heck's seeks to file its brief is unclear. Although it has amended the caption of the case to list itself as a respondent, on page 2 of the brief it "requests that it be made a party before this Court" "by virtue of its interest in these proceedings." The latter request is a mere renewal of its motion to intervene, which this Court denied on December 3, 1973. There is no greater reason to grant intervention now, on the eve of oral argument, than there was three months ago.

The inclusion of Heck's as a respondent in the caption suggests that the company now considers itself as a party as a result of the court of appeals' grant of intervention on January 25, 1974, more than six weeks after this Court granted the petition for certiorari. It is dubious, however, whether the court of appeals then had authority to take such action. The basic theory of a writ of certiorari is that it removes a case to this Court. See the model writ of certiorari reprinted in 1 West's Federal Forms, Supreme Court § 292. Once the petition has been granted, it is difficult to see the basis upon which the

court of appeals may add an additional party to the case.

In any event, if Heck's were deemed now to be a party respondent, the question it seeks to litigate would not be properly before the Court. The question is not set forth or fairly comprised in the petition for certiorari which the Board filed (Rule 23(c) of the Rules of this Court), which raised only the issue of the propriety of the modifications of the Board's order made by the court of appeals. Heck's is not seeking to affirm the judgment of the court of appeals on an alternative ground, but to reverse it on a different ground than that presented by the petitioner. In these circumstances, the Court could properly consider the issue only upon the grant of a timely petition for certiorari raising the point. See *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426, 431-432; *National Labor Relations Board v. International Van Lines*, 409 U.S. 48, 52, n. 4. As noted, however, the Court denied Heck's petition on this issue and denied rehearing.

If Heck's filing were to be considered as a motion for leave to participate as *amicus curiae*, it should be denied because it seeks to litigate an issue not presented in the petition or to the court of appeals.

Heck's argues (Br. 4), however, that a determination of the Board's authority to award attorney's fees and organization expenses is a prerequisite to deciding the issues upon which the Court granted certiorari, namely, whether the court of appeals improperly reversed the Board's refusal to grant such re-

lief and directed the agency to do so. This Court, however, has decided issues presented by the parties without reaching underlying issues that the parties did not raise. A striking example involves the question whether a private treble damage suit could be maintained for violation of Section 3 of the Robinson-Patman Act. In *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, the Court upheld a district court judgment awarding damages for violation of that section in a private antitrust suit. Three years later, when the question whether Section 3 was one of the "antitrust laws," for violation of which a private action could be maintained, was presented to the Court, it held in *Nashville Milk Co. v. Carnation Company*, 355 U.S. 373, that the action would not lie. Cf. also *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 363-364.

II.

A. Section 10(c) of the Act, 29 U.S.C. 160(c), empowers the Board, upon finding that an unfair labor practice has been committed, to order the violator to cease and desist and "to take such affirmative action * * * as will effectuate the policies of [the] Act." "Within this limit the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay." *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U.S. 533, 539. Of course, the Act does not empower the Board "to devise punitive measures" or "to prescribe

penalties or fines which the Board may think would effectuate the policies of the Act"; the "affirmative action to 'effectuate the policies of the Act' is action to achieve the remedial objectives which the Act sets forth." *Republic Steel Corp. v. National Labor Relations Board*, 311 U.S. 7, 11-12. But the "debate about what is 'remedial' and what is 'punitive'" entails entry "into the bog of logomachy"; it is "more profitable to stick closely to the direction of the Act by considering what order does * * *, and what order does not, bear appropriate relation to the policies of the Act." *National Labor Relations Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 348.

B. Interpreted in the light of these principles, Section 10(c) of the Act empowers the Board to require an employer who has committed unfair labor practices to reimburse the union and the Board for litigation expenses, and the union for the organizational expenses, which they may have incurred as a result of those union labor practices. Contrary to Heck's contention, such relief is neither the assessment of "damages" nor the infliction of "penalties." To award the union its litigation and organizational expenses attributable to the employer's unfair labor practices is "proximately related to securing the statutory rights of employees" (Heck's Br., p. 18, n. 27). Section 7 of the Act, 29 U.S.C. 157, gives employees the right to bargain collectively through representatives of their own choosing. Such an award helps assure the employees that the union which they have chosen as their representative will have the same re-

sources to represent their interests as it would have absent the employer's unfair labor practices. Thus, "it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices." *Virginia Electric & Power Co.*, *supra*, 319 U.S. at 543.²

Republic Steel Corp. v. National Labor Relations Board, 311 U.S. 7, upon which Heck's relies (Br. 13, 19), does not support its conclusion. There the Court disapproved a Board order requiring the employer to reimburse certain government agencies for work relief payments made to employees who were unemployed because of the employer's unfair labor practices. The Court found that the Board's order was "not directed to the appropriate effectuating of the policies of the National Labor Relations Act, but to the effectuating of a distinct and broader policy with respect to unemployment. The Board has made its requirement in an apparent effort to provide adjustments between private employment and public work relief, and to carry out supposed policies in re-

² Similarly, where the employer's defenses to the unfair labor practices charged are frivolous, to require the employer to reimburse the Board for its litigation expenses serves to effectuate the policies of the Act. That restores to the government the monetary resources which it has expended in remedying those unfair labor practices, and tends to deter frivolous future litigation. This deterrence, in turn, makes more secure the future experience of organizational and collective bargaining rights by the employees immediately involved, and better enables the Board to vindicate the rights of employees in the other unfair labor practice cases which are continually being added to the Board's docket.

lation to the latter. That is not the function of the Board." *Id.* at 13. Here, on the other hand, the considerations which underlie an award of litigation and organizational expenses are, as shown above, directly related to effectuating the purposes of the Act.³

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

MARCH 1974.

³ In *Hall v. Cole*, 412 U.S. 1, 5, the Court stated that the rationale of the federal courts for taxing frivolous violators with attorneys' fees is "punitive." It does not follow that the same considerations motivate a Board award of such fees. For, as shown above and in our main brief (pp. 23-25), the Board's decision rests on its judgment of how best to effectuate the purposes of the Act.

MAY 9 1974

SUPREME COURT, U. S.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-370

NATIONAL LABOR RELATIONS BOARD,
v. *Petitioner,*

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGA-
MATED MEAT CUTTERS AND BUTCHER WORKMEN OF
NORTH AMERICA, AFL-CIO,
HECK'S, INC.,

Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF
AND
SUPPLEMENTAL BRIEF OF THE EMPLOYER,
HECK'S, INC.**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-370

NATIONAL LABOR RELATIONS BOARD,
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v.

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGA-
MATED MEAT CUTTERS AND BUTCHER WORKMEN OF
NORTH AMERICA, AFL-CIO,
HECK'S, INC.,

Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Heck's Inc., by its attorneys, hereby moves this Court pursuant to Rule 41(5) of the Court's Rules for leave to file the accompanying supplemental brief. In support whereof, the following is shown:

1. This case was argued before this Court on March 18 and 19, 1974. Subsequent to that hearing on April 25, 1974, the court below issued a decision in a closely related case—*Tiidee Products, Inc. v. National Labor Relations Board, et al.*, Nos. 72-1691, 2 (D.C. Cir. 1974)

—which bears significantly on the proper disposition of the instant case. As is more fully explained in the accompanying supplemental brief, the Circuit Court's decision in *Tiidee* directly affects the scope of the issues which the Court should consider and decide herein.

WHEREFORE, for the foregoing reasons, Heck's, Inc. respectfully moves the Court for leave to file the accompanying supplemental brief.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1973

No. 73-370

NATIONAL LABOR RELATIONS BOARD,
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HECK'S, INC.,

Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit

**SUPPLEMENTAL BRIEF OF THE EMPLOYER,
HECK'S, INC.**

The instant brief is filed as a consequence of a decision issued by the court below subsequent to the oral argument herein which bears significantly on the proper disposition of this case.

In this proceeding both the petitioner National Labor Relations Board and the respondent Food Store Employees Union have assumed the existence of the Board's power to award litigation and organizational costs as a remedy against persons found to have violated the labor

laws. They differ among themselves as to the propriety of the Board's election in this case not to exercise that power as well as a reviewing court's right to compel such an exercise. Heck's, on the other hand, has argued the more basic, threshold proposition that, under the National Labor Relations Act, the Board possessed no such power to exercise in the first instance.

Both the Board and the Union urged this Court, in briefs and in oral argument, to disregard the question raised by Heck's. Those arguments were premised in part on the contentions that the court below had assumed the existence of the subject power, that neither the Board nor the Union had challenged its existence, and that, therefore, its existence, not having been adversely litigated, was not relevantly before this Court for examination.¹

However, on April 25, 1974, the court below rendered a decision in a closely related case which affects whether this Court should consider Heck's threshold arguments in the resolution of the instant case. *Tiidee Products, Inc. v. National Labor Relations Board, et al.*, Nos. 72-1691, 2 (CA DC, 1974) (*Tiidee III*). *Tiidee* raised specifically the question of the Board's statutory power or warrant to impose the extraordinary remedy of litigation and organization costs which Heck's has sought to raise herein. The court's opinion, however, rendered by a different panel from that which decided *Heck's*, held that it was compelled to find that the Board did possess such power *because that point had been decided in the Heck's case.*² Accordingly, the contention of the Board

¹ For example, the "Supplementary Brief for the National Labor Relations Board" in *Heck's* argued that "... it [*Heck's*] seeks to litigate an issue not presented in the petition or to the court of appeals."

² Thus, Judge MacKinnon, speaking for the court below noted, in his *Tiidee* opinion, that

[Footnote continued on page 5]

and the Union that this question is not before this Court in the instant *Heck's* case because it was not presented or addressed below cannot survive the contrary conclusion of the *Tiidee III* panel of the same lower court. Indeed, the view of the Board and the Union, if adopted, would result in a logical and procedural absurdity: neither this Court nor the court below can review the question of the Board's remedial power because the court below in its *Heck's* decision both did not decide—and did decide—, respectively, the merits of that issue.

The argument in favor of this Court's consideration here of the asserted existence of the challenged administrative remedial power derives support from the inextricable or symbiotic relationship between the *Heck's* and *Tiidee* cases. For it was in consequence of the lower court's remand in the first *Tiidee* case² that the Board determined it could impose litigation costs, a decision which the lower court then extended to *Heck's* which, in turn, was then applied as binding precedent in the recent *Tiidee* case decided on April 25, 1974. The lower court recognized the "disturbing circularity of this approach"³ which has also rendered *Heck's* and *Tiidee* indistinguishable aspects of a single decisional process and rule. And it is the legitimacy of that rule which *Heck's* seeks to raise here and which underlies both cases.

Therefore, in view of the intervention, following argument in the instant case, of *Tiidee III* and its binding

² [Continued]

"... Judges Tamm and Robb feel that debate in this circuit has been foreclosed by [*Heck's*] ... I agree ..."

"As stated above, we do not write today on a clean slate but are bound as to the law by *Food Store [Heck's]*."

³ *International Union of Electrical, Radio and Machine Workers v. NLRB*, 426 F.2d 1243, cert. den., 400 U.S. 950 (1970) (*Tiidee I*).

⁴ *Tiidee III*, at footnote 16.

reliance upon the *Heck's* decision below, *Heck's* seeks the adoption by this Court of one of the following appropriate methods for the disposition of this suit. The Court is urged either to decide the question of Board power raised by *Heck's* as one which was in fact raised and litigated below and constitutes a prerequisite for the resolution of this case; or to limit the decision in *Heck's* to the question of courts' authority to review the Board's remedial orders while reserving consideration of the scope of the Board's remedial power pending a joinder for argument on that issue of *Heck's* and *Tiidee*, now before the Court on petition for writ of certiorari.^{*} In the alternative, the Court may treat the instant submission as a Petition for Rehearing of *Heck's* prior petition for writ of certiorari, No. A-645, (73-559), occasioned by the lower court's recent decision in *Tiidee III* which conferred upon the *Heck's* decision below a role and importance not previously appreciated. The adoption of any of these enumerated alternatives would permit a resolution of a significant and recurring problem in the interpretation and administration of the National Labor Relations Act in a manner which would permit all affected parties in these cases to be heard without prejudice to any of them.

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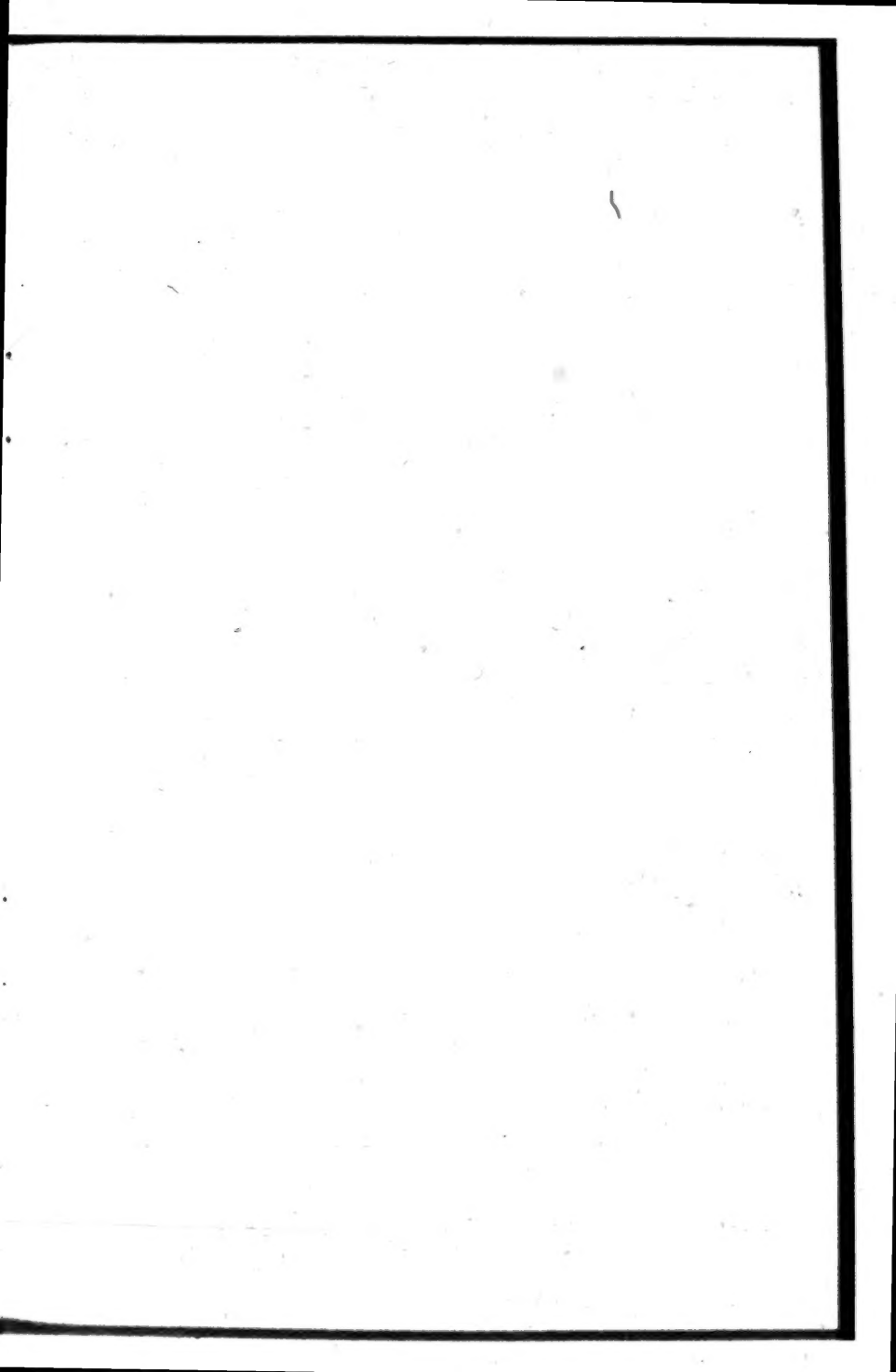
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^{*} *Tiidee Products, Inc. v. NLRB*, No. 73-1180





CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES

AT
OCTOBER TERM, 1973

**NATIONAL LABOR RELATIONS BOARD v. FOOD
STORE EMPLOYEES UNION, LOCAL 347,
AMALGAMATED MEAT CUTTERS
& BUTCHER WORKMEN OF
NORTH AMERICA,
AFL-CIO**

**CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

No. 73-370. Argued March 18-19, 1974—Decided May 20, 1974

After finding that Heck's Inc. had engaged in pervasive unfair labor practices, the National Labor Relations Board (NLRB) issued a cease-and-desist order against it, but rejected the argument of respondent union, the charging party, for additional remedies, including reimbursement of litigation expenses and excess organizational costs incurred as a result of Heck's illegal conduct. The Court of Appeals enforced the NLRB's order but remanded the case to the NLRB for further consideration of additional remedies. The NLRB again refused to order reimbursement of litigation expenses and excess organizational costs, reasoning that its "orders must be remedial, not punitive, and collateral losses are not considered in framing a reimbursement order" and that the Board, not the charging party, is entrusted with primary responsibility to protect the public interest. The Court of Appeals enforced the NLRB's amended order but, concluding that the NLRB

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had meanwhile in *Tüdee Products, Inc.*, 194 N. L. R. B. 1234, changed its policy, enlarged the NLRB's order by requiring Heck's to "[p]ay to the Union any extraordinary organizational costs which the Union incurred by reason of Heck's policy of resisting organizational efforts and refusing to bargain" and to "[p]ay to the Board and the Union the costs and expenses incurred by them" in connection with the litigation. Sections 10 (e) and (f) of the National Labor Relations Act authorize courts of appeals to "make and enter a decree . . . modifying and enforcing as so modified" an NLRB order. *Held*: The Court of Appeals, although properly refusing to resolve inconsistencies in the Board's decisions in this case and in *Tüdee* by accepting Board counsel's rationalizations, erroneously exercised its authority under §§ 10 (e) and (f), since it was "incompatible with the orderly function of the process of judicial review" (*NLRB v. Metropolitan Life Ins. Co.*, 380 U. S. 438, 444) for that court to enlarge the Heck's order without first affording the NLRB an opportunity to evaluate this case in the light of the policy enunciated in *Tüdee* and to decide whether that policy should be applied retroactively. Pp. 8-11.

155 U. S. App. D. C. 101, 476 F. 2d 546, reversed and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Friedman argued the cause for petitioner. On the brief were *Solicitor General Bork*, *Mark L. Evans*, *Peter G. Nash*, *John S. Irving*, *Patrick Hardin*, *Norton J. Come*, and *Linda Sher*.

Mozart G. Ratner argued the cause for respondent. With him on the brief were *Bernard Ries*, *Joseph M. Jacobs*, and *Judith A. Lonnquist*. *Fred Holroyd* and *Jerry Kronenberg* filed a brief for Heck's Inc., intervenor below.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The National Labor Relations Board refused to include, in a cease-and-desist order against Heck's Inc., a provision sought by respondent union, as charging party, that Heck's reimburse respondent's litigation ex-

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1-1114

penses and excess organizational costs incurred as a result of Heck's unlawful conduct. The Board's stated reason was that "it would not on balance effectuate the policies of the [National Labor Relations] Act to require reimbursement with respect to such costs in the circumstances here." *Heck's Inc.*, 191 N. L. R. B. 886, 889 (1971). Respondent prevailed, however, in enforcement and review proceedings in the Court of Appeals for the District of Columbia Circuit. That court enlarged the Board's order by adding provisions, paragraphs 2 (e) and (f), that Heck's "[p]ay to the Union any extraordinary organizational costs which the Union incurred by reason of Heck's policy of resisting organizational efforts and refusing to bargain, such costs to be determined at the compliance stage of these proceedings," and "[p]ay to the Board and the Union the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of these cases before the National Labor Relations Board and the courts, such costs to be determined at the compliance stage of these proceedings." See 155 U. S. App. D. C. 101, 476 F. 2d 546 (1973). We granted certiorari to consider whether the enlargement of this order was a proper exercise of the authority of courts of appeals under §§ 10 (e) and (f) of the National Labor Relations Act, as amended, 61 Stat. 146, 29 U. S. C. §§ 160 (e) and (f), to "make and enter a decree . . . modifying, and enforcing as so modified" the order of the Board, 414 U. S. 1062 (1973). We reverse.

Heck's Inc. operates a chain of discount stores in the Southeast section of the country. Its resistance to union organization has resulted in some 11 proceedings before the National Labor Relations Board.¹ This case grew out of its efforts to prevent organization by respondent

¹ The many proceedings are cited in the opinion of the Court of Appeals, 155 U. S. App. D. C. 101, 102 n. 1, 476 F. 2d 546, 547 n. 1.

union of Heck's employees at its store in Clarksburg, West Virginia. The case was twice before the Board. In its first decision, the Board determined that Heck's violated § 8 (a)(1) of the Act, 29 U. S. C. § 158 (a)(1), by threatening and coercively interrogating employees during respondent's organizational campaign, and by conducting a nonsecret poll to ascertain employee support for the union. Further, the Board found that Heck's "flagrant repetition" of similar unfair labor practices at its other stores and its "extensive violations of the Act" in the Clarksburg store justified an inference that Heck's did not entertain any good-faith doubt concerning majority support for respondent union when the company refused to recognize and bargain with the union on the basis of authorization cards signed by a majority of employees. Accordingly, the Board found that Heck's violated §§ 8 (a)(5) and (1) of the Act, 29 U. S. C. §§ 158 (a)(5) and (1). Finally, because Heck's extensive violations were found to have made a free and fair election impossible, an order directing Heck's to bargain with the union was entered. The Board rejected, however, the union's argument that adequate relief required certain additional remedies, including reimbursement of litigation expenses and excess organizational costs incurred as a result of Heck's unlawful behavior.² *Heck's Inc.*, 172 N. L. R. B. 2231 n. 2 (1968).

The Court of Appeals for the District of Columbia Circuit enforced the Board's order, but remanded to the

² The Board also rejected respondent's requests for provisions directing the mailing of notices to employees; either a company-wide bargaining order or a shifting of the burden of proof in future cases to require Heck's to demonstrate its good faith in rejecting authorization cards; injunctions under § 10 (j) of the Act, 29 U. S. C. § 160 (j); increased access to employees; and a "make-whole" provision directing compensation to employees for collective-bargaining benefits lost as a result of the employer's unlawful conduct.

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Board for further consideration of additional remedies including reimbursement of litigation expenses and excess organizational costs. 139 U. S. App. D. C. 383, 433 F. 2d 541 (1970).³ On remand, the Board amended its original order to encompass certain supplemental remedies,⁴ but again refused to order reimbursement of litigation expenses and excess organizational costs.⁵ 191 N. L. R. B. 886. Although the Board found that Heck's unfair labor practices were "aggravated and pervasive" and that its intransigence had probably caused the union to incur greater litigation expenses and organizational costs, the Board's rationale, previously mentioned, was that the provision would not effectuate the policies of the Act. The Board reasoned that its "orders

³ The remand was ordered in light of the Court of Appeals' intervening decision in *International Union of Elec., Radio & Mach. Workers v. NLRB*, 138 U. S. App. D. C. 249, 426 F. 2d 1243 (1970), known as the *Tiidee Products* case, in which the court had remanded for further Board consideration a union's submission that similar supplementary remedies were necessary where an employer's refusal to bargain was found to be "a clear and flagrant violation of the law," and its objections to a representation election were determined to be "patently frivolous." *Id.*, at 254, 426 F. 2d, at 1248.

⁴ The Board directed Heck's to mail notices of the Board's amended order to the homes of all employees at each of Heck's store locations; to provide the union with reasonable access for a one-year period to bulletin boards and other places where union notices are normally posted; and to provide the union with a list of names and addresses of all employees at all locations, to be kept current for one year.

⁵ The Board also refused to order, as sought by respondent, that notices of the Board's decision be read to assembled groups of employees; that a companywide bargaining order be issued; that the company be required to bargain whenever the union obtained an authorization card majority at other locations; that greater access to employees on company property be granted; and that a "make-whole" provision for reimbursement of dues and fees, and collective-bargaining benefits, lost as a result of the unlawful refusal to bargain, be ordered.

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must be remedial, not punitive, and collateral losses are not considered in framing a reimbursement order." *Id.*, at 889 (footnotes omitted).^{*} Moreover, a charging party's participation in the case is, the Board found, primarily for the purpose of protecting its private interests, whereas the Board has the primary responsibility for protecting the public interest. The Board therefore concluded that, although the public interest might also arguably be served "in allowing the Charging Party to recover the costs of its participation in this litigation," that consideration did not "override the general and well-established principle that litigation expenses are ordinarily not recoverable." *Ibid.* (Footnote omitted.)

Prior to review of its supplementary decision in the Court of Appeals, the Board issued its decision in *Tüdee Products, Inc.*, 194 N. L. R. B. 1234 (1972), in which the Board ordered reimbursement of litigation expenses in the context of a finding that an employer had engaged in "frivolous litigations."[†] The Board's opinion in *Tüdee* reasoned that industrial peace could be best achieved if "speedy access to uncrowded Board and court dockets [were] available" and therefore that an assessment of legal fees would serve the public interest by "discourag[ing] future frivolous litigation," *id.*, at 1236. The Board did not explain why those considerations had not

^{*} In support of this proposition, the Board relied upon *Republic Steel Corp. v. NLRB*, 311 U. S. 7, 11-12 (1940), and *NLRB v. Gullett Gin Co.*, 340 U. S. 361, 364 (1951).

[†] The Board's decision in *Tüdee* was issued after supplementary proceedings following a remand from the Court of Appeals. See n. 3, *supra*. In an opinion filed April 25, 1974, the Court of Appeals, on review of the Board's supplementary decision in *Tüdee*, enforced as modified the Board's amended order. *International Union of Elec., Radio & Mach. Workers v. NLRB*, — U. S. App. D. C. —, — F. 2d —.

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led it to order similar relief in this case. The Court of Appeals therefore concluded in the present case that the Board had abandoned its policy against award of litigation expenses and excess organizational costs,² stating:

"Although the Board in its Supplemental Decision in this case has nowhere characterized the litigation as frivolous, it has used the language of 'clearly aggravated and pervasive' misconduct; and in its original opinion it questioned Heck's good faith because of its 'flagrant repetition of conduct previously found unlawful' at other Heck's stores. It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board. We hold that the case before us is an appropriate one for according such relief." 155 U. S. App. D. C., at 106, 476 F. 2d, at 551.

²The Court of Appeals made clear that the enlargement of the Board order was based squarely on the Board's change of policy perceived to have been made by *Tudee*. The court refused to decide the question argued by respondent union that, independently of *Tudee*, an order of reimbursement should be directed. The Court of Appeals said:

"There are, it seems to us, obvious difficulties [in relying upon the subsidiary role of the charging party as a basis for denial of litigation expenses], certainly in the case of an employer who appears to look upon litigation as a convenient means of delaying—and thereby perhaps avoiding—the fatal day of union recognition and collective bargaining. We need not pursue those difficulties in detail, however, for the reason that the Board itself has subsequently departed from the rationale upon which its refusal of litigation expenses in this case is based." 155 U. S. App. D. C., at 105, 476 F. 2d, at 550 (emphasis added).

The Court of Appeals also viewed *Tüdes* as the signal of a shift in the Board's attitude toward excess organizational costs. In *Tüdes*, the Board refused to order reimbursement of excess organizational costs because "no nexus between [the employer's] unlawful conduct . . . had been proved. *Ibid.* Since, in the instant case, the Board had indicated that Heck's violations had probably caused respondent to incur excess organizational costs, a nexus was proved and accordingly the court held that respondent was entitled to an order directing reimbursement of organizational costs.

In the circumstances of this case, the Court of Appeals, in our view, improperly exercised its authority under §§ 10 (e) and (f) to modify Board orders, and the case must therefore be returned to the Board.⁹ Congress has invested the Board, not the courts, with broad discretion to order a violator "to take such affirmative action . . . as will effectuate the policies of [the Act]." 29 U.S.C. § 160 (c); see, e. g., *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 176 (1973). This case does not present the exceptional situation in which crystal-clear Board error renders a remand an unnecessary formality. See *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941); *Communications Workers v. NLRB*, 382 U.S. 479 (1960). For it cannot be gainsaid that the finding here that Heck's asserted at least "debatable" defenses to the unfair labor practice charges, whereas objections to the representation election in *Tüdes* were "patently frivolous," might have been viewed by the Board as putting the question of remedy in a different light. We cannot

⁹ We thus have no occasion at this time to address the question whether the Board's broad powers under § 10 (c), 29 U.S.C. § 160 (c), to fashion remedies include power to order reimbursement of litigation expenses and excess organizational costs.

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say that the Board, in performing its appointed function of balancing conflicting interests, could not reasonably decide that where "debatable" defenses are asserted, the public and private interests in affording the employer a determination of his "debatable" defenses, unfettered by the prospect of bearing his adversary's litigation costs, outweigh the public interest in uncrowded dockets.

There are, however, facial inconsistencies between the Board's opinion in this case and the *Tudee* decision, and the Court of Appeals therefore correctly declined to resolve those inconsistencies by substituting Board counsel's rationale for that of the Board. 155 U. S. App. D. C., at 107 n. 8, 476 F. 2d, at 552 n. 8; see *NLRB v. Metropolitan Life Ins. Co.*, 380 U. S. 438, 444 (1965); *Burlington Truck Lines v. United States*, 371 U. S. 156, 168-169 (1962). The integrity of the administrative process demands no less than that the Board, not its legal representative, exercise the discretionary judgment which Congress has entrusted to it. But since a plausible reconciliation by the Board of the seeming inconsistency was reasonably possible, it was "incompatible with the orderly function of the process of judicial review," *NLRB v. Metropolitan Life Ins. Co.*, *supra*, at 444, for the Court of Appeals to enlarge the Heck's order without first affording the Board an opportunity to clarify the inconsistencies.

It is a guiding principle of administrative law, long recognized by this Court, that "an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *FCC v. Pottsville Broadcasting Co.*, 309 U. S. 134, 145 (1940); see *Fly v. Heitmeyer*, 309 U. S. 146, 148 (1940); *FTC v. Morton Salt Co.*, 334 U. S. 37, 55 (1948); *FPC v. Idaho Power Co.*, 344 U. S. 17, 20 (1952); *Koniga-*

berg v. State Bar, 366 U. S. 36, 43-44 (1961). Thus, when a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course. Application of that general principle in this case best respects the congressional scheme investing the Board and not the courts with broad powers to fashion remedies that will effectuate national labor policy. It also affords the Board the opportunity, through additional evidence or findings, to reframe its order better to effectuate that policy. See *FPC v. Idaho Power Co.*, *supra*, at 20; *FTC v. Morton Salt Co.*, *supra*, at 55. Moreover, in this case, if the Court of Appeals correctly read *Tudee* as having signaled a change of policy in respect of reimbursement, a remand was necessary, because the Board should be given the first opportunity to determine whether the new policy should be applied retroactively.¹⁰

¹⁰ Appellate courts ordinarily apply the law in effect at the time of the appellate decision, see *Bradley v. School Board*, 416 U. S. 696, 711 (1974). However, a court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act.

In its present posture the case does not, of course, present the question whether Board failure, on remand, to clarify the apparent inconsistency in its decisions would warrant reversal on review. Compare *Barrett Line v. United States*, 326 U. S. 179 (1945), with *FCC v. WOKO, Inc.*, 329 U. S. 223, 227-228 (1946). See L. Jaffe, *Judicial Control of Administrative Action* 587-588 (1965); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 947-950 (1965).

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The judgment of the Court of Appeals is reversed insofar as paragraphs 2 (e) and (f) were added to the Board's order, and the case is remanded to the Court of Appeals with direction that it be remanded to the Board for further proceedings.

It is so ordered.

WILLIAM E. ARNOLD CO. v. CARPENTERS DISTRICT COUNCIL OF JACKSONVILLE AND VICINITY ET AL.

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 73-466. Argued March 20, 1974—Decided May 20, 1974

When respondent unions called a jurisdictional-dispute strike against petitioner employer, petitioner brought this suit, which is within the purview of § 301 of the Labor Management Relations Act, in a Florida trial court to enjoin respondents' breach of a no-strike clause in the collective-bargaining agreement containing a binding settlement procedure. That court issued a temporary restraining order against the strike, and its action was upheld by an intermediate appellate court. The Florida Supreme Court reversed, holding that since the unions' breach was also arguably an unfair labor practice under § 8 (b) (4) (i) (D) of the National Labor Relations Act (NLRA) involving jurisdictional disputes, the jurisdiction of the National Labor Relations Board (NLRB) was exclusive. *Held*:

1. When the activity in question is arguably both an unfair labor practice prohibited by § 8 of the NLRA and a breach of a collective-bargaining agreement, the NLRB's authority "is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." *Smith v. Evening News Assn.*, 371 U. S. 195, 197. Pp. 15-18.

(a) The pre-emption doctrine of *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, is "not relevant" to actions within the purview of § 301, which may be brought in either state or federal courts. P. 16.

(b) NLRB policy is to refrain from exercising jurisdiction as to conduct which is arguably both an unfair labor practice and a contract violation when, as here, the parties have voluntarily established by contract a binding settlement procedure. P. 16.

(c) When the particular contract violations also involve an arguable violation of § 8 (b) (4) (i) (D), the NLRB has recognized added policy justifications for deferring to the contractual dispute settlement mechanism, as indicated by § 10 (k) of the NLRA, which by its special procedure for NLRB resolution of charges

involving jurisdictional disputes "not only tolerates but actually encourages" settlements of such disputes. Pp. 17-18.

2. State court jurisdiction over collective-bargaining disputes does not turn upon the particular type of relief sought, and therefore is not limited to claims for damages, rather than injunctive relief. Pp. 18-20.

279 So. 2d 300, reversed and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court.

John Paul Jones argued the cause for petitioner. With him on the brief were *Daniel R. Coffman, Jr.*, and *Allan P. Clark*.

Joseph S. Farley, Jr., argued the cause and filed a brief for respondents.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Florida Supreme Court held that the Florida District Court of Appeal erred in refusing to issue a writ of prohibition to restrain the Circuit Court for Duval County from exercising its jurisdiction over a suit within the purview of § 301 of the Labor Management Relations Act (LMRA).¹ The suit sought to enjoin respondent unions' breach of a no-strike clause contained in a

*Briefs of *amici curiae* urging reversal were filed by Solicitor General Bork, Peter G. Nash, John S. Irving, Patrick Hardin, and Norton J. Come for the United States, and by Gerard C. Smetana, Jerry Kronenberg, and Milton Smith for the Chamber of Commerce of the United States.

¹"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 61 Stat. 156, 29 U. S. C. § 185 (a).